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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compelled self-incrimination may be properly invoked by a sole proprietor in response to a subpoena for preexisting business records, many of which were not prepared by him and are of a type kept by virtually all businesses.

2. Whether a person may properly resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the government's offer of the functional equivalent of use immunity with respect to the act of production.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Reasons for Granting the petition	6
Conclusion	19
Appendix A	1a
Appendix B	22a
Appendix C	23a
Appendix D	28a

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 ..... 12, 13

Bellis v. *United States*, 417 U.S. 85 ..... 6, 11

Boyd v. United States, 116 U.S. 616 .....4, 8, 10, 15

Dreier v. *United States*, 221 U.S. 394 6

Fisher v. *United States*, 425 U.S. 391 ..... *passim*

Fred R. Witte Center Glass No. 3, In re, 544 F.2d 1026 15

Government of Virgin Islands v. *Smith*, 615 F.2d 964 18

Grand Jury Matter, In re, 673 F.2d 688, petition for cert. pending, No. 82-183 19

Grand Jury Proceedings, In re, (Johanson), 632 F.2d 1033 11

Grand Jury Proceedings, In re, (Martinez), 626 F.2d 1051 ..... 4, 11, 19

Grand Jury Subpoena, In re, (Kent Oil), 646 F.2d 963 10

ICC v. *Gould*, 629 F.2d 847..... 11, 13

United States v. *Abrams*, 615 F.2d 541 10

United States v. *Authement*, 607 F.2d 1129 ... 19

Cases—Continued: Page

United States v. *Beattie*, 541 F.2d 329 ..... 10, 13

United States v. *Bray*, 546 F.2d 851 10

United States v. *Davis*, 636 F.2d 1028, cert. denied 454 U.S. 862 ..... 9, 10, 13-14

United States v. *Doe*, 628 F.2d 694 ..... 10, 18, 19

United States v. *Mannino*, 635 F.2d 110 18

United States v. *Miller*, 660 F.2d 563 10

United States v. *Plesons*, 560 F.2d 890, cert. denied, 434 U.S. 966 10

United States v. *White*, 322 U.S. 694 6

Wilson v. *United States*, 221 U.S. 361 6

Constitution, statute and rules:

United States Constitution, Fifth Amendment ..... *passim*

18 U.S.C. 6001-6003 18

Fed. R. Evid.:

Rule 901(b)(1) 18

Rule 901(b)(2) 18

Rule 901(b)(3) 18

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-21a) is reported at 680 F.2d 327. The opinion of the district court (App. C, *infra*, 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1982. A petition for rehearing was denied on August 10, 1982. On October 1, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person *** shall be compelled in any criminal case to be a witness against himself ***.

STATEMENT

1. In the fall of 1980, a federal grand jury in Newark, New Jersey, was investigating corruption in the awarding of county and municipal contracts, as well as related tax violations. The investigation focused in part on the activities of respondent John Doe[1] and the several companies (organized as sole proprietorships) through which he did business with the units of local government.

In November and December 1980, the grand jury caused five subpoenas to be served on respondent calling for the production of numerous business records relating to his various companies (see App. D, *infra*, 28a-36a). The first two subpoenas demanded the production of the telephone toll records of several of his companies, as well as "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four bank accounts held by respondent or his companies (*id.* at 28a-31a).

The third subpoena required respondent to produce "any and all records as per the attached Schedule A for [one of

[1] Because of the ongoing grand jury inquiry, the court of appeals granted the government's request not to disclose respondent's name or any details that would identify him (see App. A, *infra*, 2a n.1). For this reason, we have not used respondent's name in this brief and have deleted his name and other potentially identifying details from the documents reproduced in the appendix.

respondent's companies] for the period January 1, 1976 to present" (*id.* at 32a-33a). Schedule A listed 28 categories of common business records (*id.* at 33a).[2]

The fourth subpoena demanded production of a similar list of business records belonging to another company (App. D, *infra*, 34a-35a). The final subpoena required respondent to testify and produce "all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts "at the Royal Bank of Canada, Georgetown, Grand Cayman Islands" belonging to two other companies (*id.* at 36a).

Respondent moved to quash all five subpoenas on Fifth Amendment grounds, and the district court granted his motion except with respect to those documents required to be kept by law (App. B, *infra*, 22a). In its opinion, the court seemingly accepted the government's argument that the documents' contents were themselves not privileged (see App. C, *infra*, 25a). The court wrote, however (*id.* at 25a-26a; emphasis in original):

> [T]he relevant inquiry is *** whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher* v. *United States*, 425 U.S. 391 (1976). ***
>
> * * * * *
>
> With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are

[2] These were:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid bonds and contracts.

> authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights.

The district court reached this conclusion even though the government had represented on the record that no subsequent use would be made of respondent's act of production and had suggested that respondent be given the "functional equivalent of use immunity" with respect to the act of production (C.A. App. 56a, 71a-72a, 75a-76a; Memorandum in Support of Motion for Reconsideration at 21-22).

2. The court of appeals affirmed (App. A, *infra*, 1a-21a). The court first rejected the government's argument that a sole proprietor, like the officer of a corporation or unincorporated association or a member of a partnership, should not be permitted to assert the Fifth Amendment privilege when served with a subpoena for the records of his business or organization. The court so held despite its recognition that "the Government's position has considerable analytic appeal" (*id.* at 6a), since permitting a sole proprietor to assert the Fifth Amendment privilege "'only because of the form of business organization'" he has chosen results in "'an irrational hole in the constitutional system of regulation of crime detection'" (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980)).

The court next concluded that respondent was entitled to resist the subpoenas at issue here on Fifth Amendment grounds. The court stated flatly that "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (App. A, *infra*, 14a). The court began by noting the rule announced in *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), that the Fifth Amendment protects an individual against the compelled production of his private papers (App. A, *infra*, 8a). The court acknowledged that *Fisher* v. *United States*, 425 U.S. 391 (1976), had "seemingly diverged from" that rule by concluding that "the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, 'applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*'" (App. A,

infra, 9a, quoting *Fisher*, *supra*, 425 U.S. at 408). The court of appeals nevertheless asserted (App. A, *infra*, 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

The court of appeals also concluded that respondent was entitled to invoke the Fifth Amendment privilege because, in its view, the act of producing the documents amounted to a potentially incriminating communication (App. A, *infra*, 14a-17a). The court distinguished *Fisher*, where a similar argument was rejected, on the ground that there "'[t]he existence and location of the papers [was] a foregone conclusion'" (*id.* at 15a, quoting *Fisher*, *supra*, 425 U.S. at 410), whereas in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (App. A, *infra*, 15a; emphasis added).

The court added that enforcement of the subpoenas would require respondent to authenticate the documents sought (App. A, *infra*, 16a). Observing that "many (although certainly not all) of the subpoenaed records *** most likely were prepared by the appellee," the court stated (*ibid.*) that "[t]he record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation."

The court next held (App. A, *infra*, 18a-19a) that respondent was entitled to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all the documents sought by the subpoenas, including those that respondent had not prepared. The court relied (*id.* at 18a & n.17) upon the government's statement that the contents of the documents sought might tend to incriminate respondent.

Finally, the court held that respondent could assert the Fifth Amendment privilege despite the government's representation that the act of producing the documents would not be used against him and despite the government's

request that he be afforded the functional equivalent of use immunity with respect to the act of production (App. A, *infra*, 19a-20a).[3]

REASONS FOR GRANTING THE PETITION

This case presents important, unsettled, and frequently recurring questions concerning the scope of the Fifth Amendment privilege against compelled self-incrimination when preexisting business records of a sole proprietorship are sought by subpoena or equivalent process.

Documentary subpoenas or summonses for business records are an indispensable tool in investigations of sophisticated criminal activity, including drug offenses, racketeering, and official corruption, as well as in the enforcement of the tax laws. This Court has decided in a variety of contexts that most types of business-related documents may be obtained by subpoena or summons despite the assertion of the Fifth Amendment privilege by the custodian of the records. Thus, it is now settled that the Fifth Amendment privilege may not properly be asserted when the records of a corporation (*Dreier* v. *United States*, 221 U.S. 394 (1911); *Wilson* v. *United States*, 221 U.S. 361 (1911)), partnership (*Bellis* v. *United States*, 417 U.S. 85 (1974)), or labor union (*United States* v. *White*, 322 U.S. 694 (1944)), are sought, but this Court's decisions leave unclear the status of the records of sole proprietorships, and the courts of appeals are divided on this important issue. Following the reasoning in *Fisher* v. *United States*, *supra*, at least one court of appeals has held that the Fifth Amendment does not protect the contents of any preexisting business records (see page 10, *infra*). However, other courts of appeals (see

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[3] Following the quashing of the subpoenas at issue here, respondent was indicted and convicted of various charges stemming from the grand jury investigation. Execution of sentence was suspended, and respondent was placed on probation and fined. However, the grand jury investigation is continuing, production of the requested documents is still needed, and there remains the possibility that the contents of the documents would incriminate respondent as to offenses other than those for which he has already been convicted. Accordingly, the case is not moot.

pages 9-10, *infra*), including the court below (App. A, *infra*, 14a), have held that the contents of an individual's business records are privileged. These courts note that this question was not specifically decided in *Fisher*, where the records in question did not belong to and had not been created by the persons asserting the privilege. Instead of *Fisher*, these courts look to the rule—announced in *Boyd* v. *United States*, *supra*, and discredited in *Fisher* (425 U.S. at 404-409)—that the Fifth Amendment prohibits the compulsory production of private papers.

Sole proprietorships are the most common form of business organization in this country, and subpoenas and summonses for the records of such enterprises are a daily occurrence. Thus, the present confusion concerning the applicability of the Fifth Amendment privilege to subpoenas for such records is in great need of resolution by this Court.

This Court should also resolve whether a sole proprietor or individual may resist compliance with a subpoena duces tecum or documentary summons on the ground that the act of production itself would be self-incriminating, a question left open by *Fisher* (see 425 U.S. at 410). And even if that question is answered favorably to the person invoking the privilege, the issue remains whether the availability of the privilege can somehow survive the government's offer of use immunity with respect to that act. While at least one court of appeals has held that the Fifth Amendment privilege may not properly be asserted in that situation (see page 19, *infra*), the court below affirmed the quashing of subpoenas even though the government had offered the functional equivalent of act of production immunity. Where the act of production is considered sufficiently testimonial and incriminating to sustain the claim of privilege, the efficacy of such immunity grants to secure production of the records is manifestly a matter of substantial importance.

1. The decision of the court of appeals poses an important question left unresolved by this Court's decision in *Fisher* v. *United States*, *supra*, i.e., whether the contents of an individual's business records are protected by the Fifth Amendment privilege. In *Fisher*, taxpayers under investi-

gation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents in question was written by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on grounds of attorney-client privilege because the Fifth Amendment would not have prevented disclosure of the documents if they had remained in the taxpayers' possession.

The Court began by disapproving the proposition, derived from *Boyd* v. *United States*, *supra*, that "the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate" (*Fisher*, *supra*, 425 U.S. at 405). The Court termed that proposition "a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him" (*id.* at 409) and further noted (*id.* at 408, 410-411) that that rule was inconsistent with decisions holding that the records of corporations, partnerships, and unincorporated associations could be obtained by subpoena despite a claim of Fifth Amendment privilege. The Court reasoned as follows (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court recognized (425 U.S. at 410) that it might in some circumstances be said that the act of producing the documents is the equivalent of incriminating testimony—either because it concedes "the existence of the papers demanded and their possession or control by the taxpayer" or

because it serves to authenticate them. However, the Court found that in that case the act of production would not involve testimonial self-incrimination (*id.* at 410-412).

Although nearly four pages of the Court's opinion had been spent disapproving *Boyd's* interpretation of the Fifth Amendment (425 U.S. at 405-409), the Court concluded with the following observation (*id.* at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S., at 634-635.

In sum, although *Fisher* refrained from expressly deciding the question presented by this case, the Court's reasoning extended far beyond its narrow holding. The courts of appeals have responded to *Fisher* in two ways. Some have followed *Fisher's* reasoning toward its logical conclusion, while others have confined *Fisher* to its facts and have "continued to recognize *Boyd's* protection-of-private-papers principle" (App. A, *infra*, 11a n.7) in all other situations. The results have been conflicting decisions by the courts of appeals and doctrinal incongruities termed irrational or illogical by the very courts that have adhered to them.

a. The courts of appeals are sharply divided concerning the issue whether the Fifth Amendment protects the contents of an individual's business records. As previously noted, the court below, expressing continued allegiance to *Boyd*, held (*id.* at 14a) "that an individual's business papers *** cannot be subpoenaed by a grand jury." The Fifth Circuit has taken a similar position. In *United States* v. *Davis*, 636 F.2d 1028, 1043, cert. denied, 454 U.S. 862 (1981), the court vacated portions of an order enforcing an IRS summons, stating a rule "that any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in

content" (636 F.2d at 1043; footnotes omitted). The court stated (*id.* at 1042) that it refused to "limit the *Boyd* principle to non-business records or abolish it altogether." See also *United States* v. *Miller*, 660 F. 2d 563, 566-567 (5th Cir. 1981). Similarly, in *In re Grand Jury Subpoena (Kent Oil)*, 646 F.2d 963, 968 (5th Cir. 1981), the same court affirmed an order quashing a subpoena for a sole proprietorship's business records because "a sole proprietor's fifth amendment privilege against self-incrimination protects the 'non-required' records of the proprietorship from compelled production in response to a grand jury subpoena directed to the sole proprietor." While this Court had described *Boyd's* "prohibition against forcing the production of private papers" as a "rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him" (*Fisher*, *supra*, 425 U.S. at 409), the *Kent Oil* court stated (646 F.2d at 968; emphasis added): "[*I*]*t is settled* that the privilege reaches the compelled production of an individual's private books and papers in response to a subpoena or equivalent process, *Boyd* v. *United States*, 116 U.S. 616, 634-35 *** (1886)."[4]

By contrast, the First Circuit has held that the contents of a doctor's appointment books are not privileged because "[t]he line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection; such protection is afforded only to the testimonial content of the act of turning over the records under compulsion" (636 F.2d at 1055; footnote omitted). See also *United States* v. *Doe*, 628 F.2d 694 (1st Cir. 1980); *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980); *United States* v. *Bray*, 546 F.2d 851, 855 (10th Cir. 1976).

[4] In *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976), the court refused enforcement of the portion of an IRS summons requiring a taxpayer to turn over letters he had written to his accountant. The court stated (*id.* at 331) that "the Fifth Amendment protects against compulsory production of a paper written by an accused with respect to his own affairs." In *United States* v. *Plesons*, 560 F.2d 890, 891-892 (8th Cir.), cert. denied, 434 U.S. 966 (1977), the court concluded that a doctor's medical records, including appointment books, fell "within the historic area of protection afforded by the fifth amendment to private documents."

b. The same factors that produced the conflicting decisions noted above led the court in the instant case to draw a distinction—which the court itself described as "'irrational'" (App. A, *infra*, 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, *supra*, 626 F.2d at 1056)—between the protection afforded to the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other (see App. A, *infra*, 5a-8a). The court of appeals offered no principled defense of the distinction it drew; indeed, it stated (*id. at* 6a) that treating all business records in the same way had "considerable analytic appeal." However, the court felt compelled to reach the result it did because of dictum in *Bellis* v. *United States*, *supra*, 417 U.S. at 87-88 (see App. A, *infra*, 6a-8a). That dictum, in turn, was expressly based upon the *Boyd* rule.[5] On an earlier occasion, the same court of appeals wrote (*ICC* v. *Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980)): "[W]hile *Fisher*, *Andersen*, *Bellis*, and the cases cited therein may well presage a trend toward elimination of the fifth amendment privilege for all business records, *** such a final break with *Boyd* is not for us to make."

This Court should grant certiorari to consider whether there exists a justifiable basis for treating all corporate or partnership records differently from the records of all sole proprietorships. If, as the court below has suggested[6], one

[5] *Bellis* stated (417 U.S. at 87-88):

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635 ***. The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States*, *supra*, ***.

This interpretation of the Fifth Amendment privilege was disavowed in *Fisher* (425 U.S. at 405-409).

[6] See App. A, *infra*, 11a-12a; *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980).

of the principal purposes of the Fifth Amendment privilege is to preserve a zone of personal privacy, it appears anomalous to hold that a corporation or partnership, no matter how small or personal, enjoys no Fifth Amendment rights, while a sole proprietorship, no matter how large and impersonal, may be shielded from producing business records. On the other hand, if the Fifth Amendment privilege "protects a person only against being incriminated by his own compelled testimonial communications" (*Fisher, supra*, 425 U.S. at 409), there is similarly little if any basis for treating sole proprietorships differently from corporations and partnerships. When a subpoena is issued for preexisting business records, there is no more testimonial compulsion on the sole proprietor than there is on the corporate officer or partner. Similarly, the existence, possession, and control of certain common types of business records are no more at issue when they are subpoenaed from a sole proprietorship than when the subpoena is served upon a corporation or partnership. See *Fisher, supra*, 425 U.S. at 411-412.

The difference between a corporation and a sole proprietorships is often nothing more than a legal formality and does not reflect the size, structure, activities, or longevity of the business. In recent years, for example, thousands of physicians, lawyers, dentists, and other professionals have incorporated, principally for tax purposes. It would be anomalous indeed if the contents of the records maintained by such persons enjoyed no Fifth Amendment protection, while those of their colleagues who continued to practice as sole proprietors remained fully protected. Similarly, there is no reason why the decision to take on a partner should have such a profound effect for Fifth Amendment purposes.

c. A similar anomaly has developed with respect to the protection afforded to the contents of a sole proprietor's business records when seized, on the one hand, and when sought by subpoena or summons, on the other. [redacted] *Fisher's* application with respect to the seizure of documents was clarified in *Andresen* v. *Maryland*, 427 U.S. 463 (1976), which held that the seizure of business records and their introduction into evidence at trial does not violate the

Fifth Amendment. Rejecting the contention that the contents of such records are protected by the privilege, the Court stated succinctly (*id.* at 473):

> [P]etitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing.

The Court then explained (*ibid.*) that petitioner had neither turned over nor authenticated the records and thus had not been compelled to incriminate himself by performing either of those acts.

Andresen plainly stands for the proposition that the *contents* of preexisting business records are not privileged—as Justice Brennan expressly acknowledged in dissent (see 427 U.S. at 486). It would seem to follow, therefore, that such records may be obtained by subpoena or summons unless the act of production itself constitutes testimonial self-incrimination. Nevertheless, as previously noted, in the absence of specific direction to the contrary from this Court, several courts of appeals continue to hold that the contents of such records are privileged when requested by subpoena or summons. The same courts apply *Andresen* to seized documents and thus implicitly hold that the protection afforded to a sole proprietorship's business records differs depending upon the method by which they are sought or obtained.[7]

The Fifth Circuit recognized the absurdity of such results—while at the same time sanctioning them. Writing for the court, Judge Wisdom observed (*United States* v.

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[7] In *ICC* v. *Gould*, *supra*, 629 F.2d at 859, for instance, the Third Circuit concluded:

> [U]nder *Bellis* the fifth amendment may be asserted by a sole proprieter to shield the business records of his sole proprietorship ***. By contrast, the Supreme Court has held, in *Andresen* v. *Maryland*, 427 U.S. 463 *** (1976), that the fifth amendment affords no protection whatsoever against the search and seizure of business records.

See also *United States* v. *Davis*, *supra*, 636 F.2d at 1042; compare *United States* v. *Mannino*, 635 F.2d 110, 115-116 (2d Cir. 1980) (contents of seized notebook not privileged), with *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976) (contents of taxpayer's letters may not be obtained by IRS summons).

Davis, *supra*, 636 F.2d at 1042): "It is difficult to find a logical reason for applying the *Boyd* principle to subpoenaed documents and not documents taken in a search, as in *Andresen*." But after citing prior Fifth Circuit opinions, he concluded (*ibid.*): "However illogically, these cases by implication limit *Andresen* to documents taken in a search."

Not only is the different treatment given seized and subpenaed documents illogical, but it will have an untoward impact upon privacy. The likely effect of the disparate treatment will be to encourage the use of search warrants to obtain documents and discourage the use of subpoenas, even though the latter are plainly far less intrusive.

d. As noted, the court below and several other courts of appeals have sought to distinguish *Fisher*, where the papers in question were not written or owned by those asserting the privilege, from the much more common situation presented here. However, those distinctions are plainly invalid and have the effect of draining *Fisher* of much of its precedential significance.

The court below relied on two alleged factual differences between this case and *Fisher:* authorship and ownership of the records. *Fisher* leaves no doubt, however, that a person may not resist a subpoena or summons on Fifth Amendment grounds simply because he prepared, wrote, or owns the incriminating papers sought. The Court there stated (425 U.S. at 410; emphasis added): "The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, *whether his own* or that of someone else." The Court added (*id.* at 410 n.11): "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege."

Moreover, it is apparent that many of the documents sought by the subpoenas in this case—including telephone toll records, bank statements, and bank deposit tickets—were prepared by persons other than respondent. The court of appeals itself conceded (App. A, *infra*, 16a) that "certainly not all *** of the subpoenaed records *** were prepared by [respondent]."

As for ownership, while the *Fisher* Court assumed that the taxpayers did not have title to the accountants' workpapers, the taxpayers undoubtedly paid to have those papers prepared, and they readily obtained possession of the papers from their accountants after learning of the IRS investigation. Thus, if ownership of the papers was the determinative fact in *Fisher*, the result in that case would have been different if the taxpayers had purchased the papers from their accountants for nominal consideration or if the accountants had relinquished possession with donative intent. We do not believe that the decision in *Fisher* was based upon any such fine distinctions of state property law. As the Ninth Circuit stated in rejecting a similar interpretation of *Fisher* (*In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1028 (1976) (emphasis in original)):

> We read *Fisher* as resting on a broader principle. It permits compulsion by way of a summons or subpoena to produce documents when their *production* does not "ordinarily compel the taxpayer to restate, repeat or affirm the truth of the content of the documents sought." Mere ownership of an accountant's work papers does not convert the production of such papers into an affirmation of the truth of their contents.

The effect and clear intent of the court of appeals' decision is to make *Fisher* a very narrow exception to *Boyd's* "prohibition against forcing the production of private papers" (*Fisher*, *supra*, 425 U.S. at 409). In *Fisher*, this Court disapproved that rule (*ibid.*), but the court below candidly stated that it "continued to recognize *Boyd's* protection-of-private-papers principle" (App. A, *infra*, 11a n.7). Under its approach, the *Boyd* rule remains fully in effect, except presumably in cases involving the same peculiar factual situation as *Fisher*, i.e., where the papers sought were not written or prepared and are not owned by the person upon whom the subpoena is served. That situation will naturally arise infrequently and can be easily avoided simply by transferring title to the documents. In our view, if *Fisher* is to be restricted in this fashion and *Boyd* is to be resuscitated, that task should be performed by this Court rather than the lower federal courts.

e. *Fisher* is also undermined by the portion of the court of appeals' decision holding that the act of producing any of the documents sought by the subpoenas in this case would amount to incriminating testimonial communication. *Fisher* acknowledged (425 U.S. at 410-411) that the act of producing documents might be considered testimonial, first, if it "tacitly concedes the existence of the papers demanded and their possession or control" by the person upon whom the subpoena or summons is served and, second, if the documents are thereby authenticated. However, *Fisher* makes it clear that under circumstances such as those in the present case the act of producing at least some of the documents demanded by the subpoenas would not constitute testimonial self-incrimination.

Here, as in *Fisher*, "[i]t is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment" (425 U.S. at 411). After noting (*ibid.*) that the papers in *Fisher* were "the kind usually prepared by an accountant working on the tax returns of his client," the Court concluded:

> Surely the Government is in no way relying on the "truthtelling" of the taxpayer to prove the existence of or his access to the documents. *** The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.

This reasoning applies equally to many of the documents sought by the subpoenas in this case, such as general ledgers, vouchers, paid bills, invoices, and telephone toll records. Such documents are kept by virtually every business, from the smallest family concern to the largest conglomerate, and therefore conceding their existence, possession, and control "adds little or nothing to the sum total of the Government's information" (425 U.S. at 411)

The court of appeals attempted to distinguish *Fisher* on the ground that in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (App. A, *infra*, 15a; emphasis

added). However, the government seldom if ever knows as a certainty that subpoenaed documents exist and are subject to a witness's control. Even if the government has incontrovertible evidence that the witness had possession and control of the documents in the very recent past, the possibility will always exist that the documents were subsequently moved or destroyed. Accordingly, the decision below limits *Fisher* to an extremely narrow, if not virtually nonexistent, class of cases.

The court of appeals also contended that enforcement of the subpoenas in this case would require respondent to authenticate the documents sought, whereas in *Fisher* the taxpayers could not have authenticated the accountants' workpapers. The court of appeals wrote (App. A, *infra*, 16a): "Here *** many (although certainly not all) of the subpoenaed records *** most likely were prepared by [respondent]." But if respondent did not prepare and could not authenticate all the documents sought, why were the subpoenas quashed in their entirety? Moreover, the government represented that it would not rely upon respondent for authentication of the documents and proposed several workable methods of implementing that promise—e.g., respondent's attorneys could hand over the documents or respondent could be immunized with respect to the act of production (see page 18, *infra*).

The court of appeals observed in this connection (App. A, *infra*, 16a) that "[t]he record contains no explanation by the United States as to how documents [prepared by respondent] could be authenticated without [respondent's] explicit or implicit participation." This is odd reasoning indeed: respondent may resist production of the documents on grounds of self-incrimination because the government may be unable to use those documents against him at any subsequent trial. Obviously the government could not tell specifically how, or if, many of the documents could be authenticated until they were turned over, but as the court of appeals must have recognized, many possible alternative methods of authentication are apparent.[8]

[8] For example, a letter written by respondent could be authenticated by a handwriting expert, by any other person familiar with his handwriting, or by the trier of fact if furnished with a specimen of re-

2. Finally, this Court should grant certiorari to resolve whether a witness may resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the government's binding assurance that no use would be made of the act of production. In this case, the government agreed not to use respondent's act of production against him in any way (see C.A. App. 55a-56a, 106a-108a; Memorandum in Support of Motion for Reconsideration at 22), and the government offered several suggestions for implementing that proposal. The government suggested that respondent turn over the documents to a third party, such as the district court or his own attorney (see C.A. App. 56a, 71a-72a, 75a-76a; see also *United States* v. *Doe*, 628 F.2d 694, 696 (1st Cir. 1980). The government also suggested that the court could grant respondent "the functional equivalent of use immunity" with respect to the act of production (Memorandum in Support of Motion for Reconsideration at 22).[9]

The court of appeals held that the government's agreement not to use respondent's act of production against him provided no basis for overcoming his Fifth Amendment privilege because a formal request for statutory immunity had not been made (App A, *infra*, 19a).[10] However, the court's reasoning was clearly unsound. The court suggested that a judicial grant of use immunity with respect to the act or production would "'intrude into an area which should be more appropriately left to prosecutorial discretion'" (*id.* at

spondent's handwriting as a basis for comparison. Fed. R. Evid. 901(b)(2) and (3). A general ledger prepared by respondent could be authenticated by an employee who saw respondent prepare it or regularly used the ledger as part of his work. Fed. R. Evid. 901(b)(1).

[9] The government did not make a formal request that respondent be granted statutory immunity (see 18 U.S.C. 6001-6003) because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all documents listed in the subpoenas rather than showing that the act of producing particular documents or categories of documents would amount to testimonial self-incrimination.

[10] Ironically, the Third Circuit has held that in some circumstances a district court may immunize defense witnesses without the government's consent. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980).

20a, quoting *In re Grand Jury Matter*, 673 F.2d 688, 695-696 (3d Cir. 1982) (concurring opinion), petition for cert. pending, No. 82-183. We agree that the prerogatives of the executive branch would be improperly abridged if a court conferred testimonial immunity without the government's consent but we fail to see how prosecutorial discretion can be abridged if the prosecution's own immunity request is granted.

Since the documents sought by the subpoenas in this case were created voluntarily and not as the result of government compulsion, it must follow that conferring use immunity with respect to the act of production removed any possible basis for resisting the subpoenas on Fifth Amendment grounds. See *United States* v. *Doe*, 628 F.2d 694 (1st Cir. 1980) (statutory immunity with respect to act of production); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051 (1st Cir. 1980) (statutory immunity); *United States* v. *Davis*, *supra*, 636 F.2d at 1041 (footnote omitted) (suggesting that "it should not be a ground for refusing to produce the documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial"); *United States* v. *Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979). The decision below, which affirmed the quashing of subpoenas on Fifth Amendment grounds despite an offer of such immunity, was accordingly in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1782

IN THE MATTER OF:
GRAND JURY EMPANELLED MARCH 19, 1980
UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.A. No. 80-0053

Argued February 17, 1982
Before: ADAMS AND SLOVITER, *Circuit Judges*,
AND VANARTSDALEN, *District Judge**

(Filed June 10, 1982)

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

The United States appeals from a district court order quashing, subject to a limited exception, a number of grand jury subpoenas duces tecum. The widesweeping subpoenas,

* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

if enforced, would require a sole proprietor, who is a target of the grand jury's investigation, to produce a host of records allegedly pertaining to his business and in his possession and control. Aside from those records required to be kept by law, the district judge, citing the protection against self-incrimination afforded by the fifth amendment, declined to direct that the requested documents be made available to the grand jury. We affirm.

I

This appeal arises out of an investigation by a federal grand jury in New Jersey into corruption relating to the awarding of county and municipal contracts. A portion of the investigation focused on the appellee,[1] who, according to the United States, operated as a sole proprietor several companies that did business with various units of local government. In November and December 1980, the appellee received five separate subpoenas duces tecum, which commanded him to appear before the grand jury and produce certain documents. Specifically, the appellee was directed to provide the jurors with numerous records relating to two of appellee's companies, including ledgers, journals, workpapers, vouchers, bank statements, contracts, corporate

[1] At oral argument, it was requested that because of the ongoing nature of the grand jury inquiry, the Court not disclose either the name of the appellee or any identifying details relating to the investigation. Hence, throughout this opinion, the person against whom the grand jury subpoenas were directed will be referred to as "the appellee."

minutes, etc.,[2] "all records, including but not limited to bank statements, cancelled checks, check stubs and deposit tickets" connected with specified bank accounts of the

[2] For example, the grand jury subpoena of December 19, 1980, directed "[a]ny authorized Officer or Representative" of one of the appellee's companies to "testify before the Grand Jury and bring with you any and all books, records and documents as per the attached Schedule A for the period January 1, 1976 to present." The items requested under Schedule A of the subpoena are:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book.
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid bonds and contracts.

appellee or his companies; and the telephone toll records of certain businesses. The appellee moved to quash the subpoenas on fifth amendment grounds.

The district judge conducted two hearings before ruling on the appellee's motion. Counsel for the United States conceded, for purposes of the argument, that "all the corporations described in the subpenas are sole proprietorships," and that the subpoenaed records "are in [the appellee's] hands." Additionally, the Government admitted that the documents it sought to obtain "will or may incriminate" the appellee. *See* note 17 *infra*.

In an opinion and order dated February 4, 1981, the district court granted substantially all the relief sought by the appellee. The court reasoned that, "[a]lthough the Fifth Amendment does not protect the records of corporations, unincorporated associations or partnerships, a sole proprietor can invoke the privilege to his benefit." The court then determined that the fifth amendment right of the appellee would be infringed were he forced to turn over the various subpoenaed documents, inasmuch as the appellee thereby would be compelled to make an incriminating testimonial communication. In this connection, the district judge observed that "the [mere] *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection.... [E]nforcement of the subpoenas would compel [the appellee] to admit that the records exist, that they are in his possession, and that they are authentic." The court accordingly granted the appellee's motion to quash, except as the motion related to those subpoenaed items, such as tax returns and W-2 statements, that are required by law to be kept or to be disclosed to a public agency.

After its motion for reconsideration was denied, the United States filed a timely appeal. We have jurisdiction under 18 U.S.C. § 3731, which has been held to authorize an appeal by the Government from a district court order quashing a grand jury subpoena duces tecum. *See In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 854-58 (3d Cir. 1979).

II

We proceed to analyze the scope of protection under the fifth amendment available to a sole proprietor whose records and papers have been subpoenaed by a grand jury. Our inquiry in this regard is fourfold: (A) Can the fifth amendment privilege be invoked by a sole proprietor in response to a subpoena for his business-related records? (B) If so, under the particular circumstances of this case, would compelled production of the subpoenaed documents amount to an incriminating testimonial communication, thereby entitling the appellee to take refuge in the protection afforded by the amendment? (C) Did, as the United States contends, the appellee fail to qualify for that protection by proffering an overly-broad motion to quash? (D) And, even if the appellee prevails with respect to the previous questions, can the Government nonetheless compel production of the requested records by suggesting that the act of their surrender be "immunized"?

A

As has often been noted, the constitutional privilege against self-incrimination is "essentially *a personal* one, applying only to natural individuals," *United States v. White*, 322 U.S. 694, 698 (1944) (emphasis added). The privilege, consequently, cannot be asserted by a collective group, such as a corporation or a union, or by a representative, employee, or agent of a collective group. Employing this principle, the Supreme Court has refused to recognize a claim of fifth amendment protection with respect to individually held records of corporations. *Wilson v. United States*, 221 U.S. 361 (1911); labor unions, *United States v. White, supra:* organizations. *McPhaul v. United States*, 364 U.S. 372 (1960); political parties, *Rogers v. United States*. 340 U.S 367 (1951); and partnerships, *Bellis v. United States*. 417 U.S. 85 (1974). "[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally," *Bellis, supra*. 417 U.S. at 88.

From this, the United States urges that the appellee should be obligated to turn over the documents requested here, however incriminating, for the same reasons that an individual in possession of corporate or partnership records is required to comply with a grand jury subpoena. The Government maintains that "it would be anomalous to hold that a corporation or partnership, no matter how small or personal, enjoys no fifth amendment rights, while a sole proprietorship, no matter how large and impersonal, is shielded from producing business records." Brief for Appellant at 13.

Although the Government's position has considerable analytic appeal,[3] it is clear that, under the present state of the law, the fifth amendment may be invoked by a sole proprietor regardless of the magnitude of his business. In *Bellis*, *supra*, the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the *size* of the organization the records of which were being subpoenaed, but rather the *nature* of the capacity—either personal or representational—with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations which have 'a recognizable juridical existence apart from [their] members,'" such as corporations or partnerships, and "those which do not," such as sole proprietorships. *In re Grand Jury Empanelled (Colucci)*, *supra*, 597 F.2d at 859 (quoting *In re Grand Jury Investigation*, 483 F.2d 961, 962 (3d Cir. 1973), *aff'd*,

[3] As the Court of Appeals for the First Circuit recently observed, if "[o]nly the personal self-created business records in the possession of a sole proprietor or practitioner . . . enjoy a privilege against subpoena," and "only because of the form of business organization chosen by their creator," such a rule would create "an irrational hole in the constitutional system of regulation of crime detection and would provide the individual with a remedy far exceeding the scope of his constitutional privilege." *In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1056 (1st Cir. 1980). The court proceeded to recommend that prosecutors make use of various immunity statutes, in order to "[h]armoniz[e] the government's right of lawful access to the contents of personal business records with the possessor's right not to have the testimonial implications of his submission used against him." *Id.*; *see* Part II (D) of this opinion, *infra*.

Bellis, supra). While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony ... *The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added).

In a straightforward application of *Bellis*, this Court rejected a previous effort on the part of the United States to construe the fifth amendment so as to distinguish between, for example, a small, family-operated sole proprietorship, and a large, corporate-like solely owned entity. Judge Garth, writing for the Court, noted that the decisional law clearly did not support such a distinction:

> An individual who holds records in a representative capacity for a collective entity (e.g. a corporation, union or partnership) may not assert a Fifth Amendment privilege when he is compelled to produce those records. On the other hand, a sole proprietorship has no legal existence apart from its owner, and such records *may* be protected from disclosure by the Fifth Amendment.

In re Grand Jury Empanelled (Colucci), supra. 597 F.2d at 859. *See also In re Grand Jury Subpoena (Kent).* 646 F.2d 963, 968 (5th Cir. 1981) ("[t]he fifth amendment protection applicable to a sole proprietor's business records is the same as the protection applicable to the records of an individual").

As the United States concedes, the appellee operates a number of sole proprietorships. Following *Bellis* and *In re Grand Jury Empanelled (Colucci)*, therefore, we conclude that the case law dealing with documents held by representatives of a collective group does not defeat the appel-

lee's claim of privilege under the fifth amendment. 597 F.2d at 859. Accordingly, we proceed to consider whether that claim should be honored, in view of the particular circumstances of this case.

B

Before *Fisher v. United States*, 425 U.S. 391 (1976), the prevailing rule was that "the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony," *Bellis, supra*, 417 U.S. at 87. This principle, which had its genesis in the English tradition,[4] was endowed with constitutional status nearly a century ago, when the Supreme Court held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" violated the fifth amendment. *Boyd v. United States*, 116 U.S. 616, 630 (1886). "Papers are [the owner's] ... dearest property," the Court reasoned; forcing their production "would be subversive of all the comforts of society," *Id.* at 627-28.

Prior to *Fisher*, an unbroken line of cases repeated the axiom that an individual's private papers were protected from compelled disclosure by the fifth amendment. *See Fisher, supra*, 425 U.S. at 419-20 (Brennan, J., concurring in the judgment) (citing cases). Among the more prevalent rationales for this principle was the notion that "the protection of personal privacy is a central purpose of the privilege against compelled self-incrimination," and that personal privacy, properly understood, extended to the private written word as well as to the private unspoken thought; after all, under a contrary rule, "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those

[4] *See* the cases and authorities cited by Judge Hunter in *In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1043-44 (3d Cir. 1980).

memories would become the subjects of criminal sanctions however invalidly imposed." *Id.* at 416, 420 (Brennan, J., concurring in the judgment).

In *Fisher*, the majority seemingly diverged from these precedents. Justice White, writing for himself and five other Justices, noted that "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time," asserted that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers" had been repeated in subsequent decisions as mere "dictum," and concluded that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." 425 U.S. at 407-09. By focusing on the precise words of the amendment—*viz*, that "[n]o person ... shall be *compelled* in any criminal case to be a *witness against himself*," *id.* at 396 (emphasis by the Court)—the Justices arrived at a three-factor restatement of the applicability of the privilege against self-incrimination: the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, "applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*," *id.* at 408. In effect, the focus of the Court had shifted from privacy to the process of compulsion. *See* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath* of Fisher v. United States, 95 Harv. L. Rev. 683, 683 (1982).

Applying the new test to the facts of the *Fisher* case, the Court concluded that requiring a defendant-taxpayer to produce an accountant's workpapers in the taxpayer's possession[5] would not violate the fifth amendment, regardless

[5] Actually, the workpapers were not in the taxpayer's possession, but rather in the hands of his attorney, to whom the subpoena had been directed. The Court considered the status of the records in the taxpayer's hands, however, inasmuch as "[s]ince [the] taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance ... the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege." 425 U.S. at 405.

of how incriminating those papers might be to the taxpayer, because "the privilege protects a person only against being incriminated by his own compelled testimonial communications.," 425 U.S. at 409. In *Fisher*, the accountant's workpapers did not belong to the taxpayer, were not prepared by him, and contained no testimonial declaration by him; for that matter, inasmuch as their preparation was "wholly voluntary," the records "cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." *Id.* at 409-10.

The Court in *Fisher* recognized, however, that there were two situations where "[t]he act of producing evidence in response to a subpoena" could be said to have "communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. at 410-13. First, the act of producing documents in some instances might amount to an admission of the existence of such documents and their possession or control by the taxpayer. Second, the act of production might resemble the act of testimonial self-incrimination if responding to a subpoena would in some sense "authenticate" the documents produced. *See United States v. Beattie*, 522 F.2d 267, 270 (2d Cir. 1975) (Friendly, J.) ("[a] subpoena demanding that an accused produce his own records is ... the equivalent of requiring him to take the stand and admit their genuineness"). Because neither of these situations was present in *Fisher*,[6] however, the Court reiterated its conclusion that the fifth amendment

[6] In *Fisher*, there was no fear that compliance with the subpoena might provide the Government with the taxpayer's useful admission that he was aware and in possession of the requested documents. The Government knew that the accountant's workpapers existed and knew where they were located; therefore, the question was not one "of testimony but of surrender." Moreover, inasmuch as it is not illegal to seek accounting advice, the taxpayer's mere possession of these papers did not of its own accord pose "any realistic threat of incrimination to the taxpayer." 425 U.S. at 411-12. The problem of implicit authentication also was not present in *Fisher*: because the taxpayer, under the relevant rule of evidence, was not competent to authenticate the accountant's workpapers, his mere production of those papers "express[es] nothing more than the taxpayer's belief that the papers are those described in the subpoena." 425 U.S. at 413.

did not prevent the Government from obtaining, through subpoena, an accountant's workpapers in the possession of a taxpayer or his attorney.[7]

Fortified with this precedential perspective, we turn to a consideration of the dispute at bar. There can be little doubt that, had the grand jury subpoenas at issue here been directed to the appellee's *personal* papers, his assertion of the fifth amendment would be in order. To be sure, the Supreme Court in *Fisher* explicitly left open the *Boyd* question, *viz*, "[w]hether the Fifth Amendment would shield the taxpayer from producing *his own* tax records [as opposed to an accountant's workpapers] in his possession." 425 U.S. at 414 (emphasis added). But this Court, in accord with the Second Circuit,[8] already has concluded that

[7] In the aftermath of *Fisher* and Andresen v. Maryland, 427 U.S. 463 (1976) (holding that the seizure of papers, either public or private, pursuant to a valid search warrant, does not violate the fifth amendment, inasmuch as their possessor was not compelled "to aid in the discovery, production, or authentication of incriminating evidence," *id.* at 474), a number of commentators assumed that the Court had sounded the death-knell for the *Boyd* private-papers rule. *See, e.g.*, C. Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts 279-80 (1980) ("By ahering to a narrow concept of what constitutes compulsion, instead of to the policies underlying the right, the Supreme Court has stripped the protection of the privilege from books and papers, the written counterpart of the "inviolable human personality'"); Gerstein. *The Demise* of Boyd: *Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343 (1979); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945 (1977). In fact, however, as discussed in the text *infra*, the Court declined to decide the "private papers" issue of *Boyd*. Moreover, lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle. *See In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033, 1044 n. 23 (3d Cir. 1980) ("Although some commentators have predicted the demise of this fifth amendment right, ... we explicitly reject this prophecy"); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fishery*, United States, 95 Harv. L. Rev. 683, 692-94 (1982).

[8] *See In re* Grand Jury Subpoena Duces Tecum (April 23, 1981), 657 F.2d 5, 8 n.1 (2d Cir. 1981), *decision on remand*. 522 F. Supp. 977, 979 (S.D.N.Y. 1981); United States v. Beattie, 541 F.2d 329, 331 (2nd Cir. 1976).

the fifth amendment privilege applies, even after *Fisher*, to an individual's production of his private papers in response to a subpoena. In *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980), relying primarily on *Boyd* and its progeny, we concluded—or, more accurately, reaffirmed our conclusion in light of *Fisher*—that one of the purposes of the fifth amendment was to ensure an individual's right "to a private enclave where he may lead a private life" (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964)).[9] Noting that no case as of yet had held that the fifth amendment did not protect an individual's personal papers from compelled production, Judge Hunter observed that the "failure to continue to preserve this right, which we believe basic, would be a step backward in what has been a long and bitterly contested battle to accord rights to persons who stand accused of crime." 632 F.2d at 1044 & n. 23. Accordingly, the Court declined to enforce a subpoena that sought to obtain an individual's private pocket diaries. *In re Grand Jury Proceedings (Johanson)*, then, at least until overruled by an in banc Court, forecloses consideration of whether the appellee's private papers are subject to subpoena by a grand jury.

It would appear from the face of the subpoenas that nearly all of the apellee's records demanded by the Government are of a business, as opposed to a personal, nature, although the district court has made no finding on this score. The United States argues that, whatever the protection afforded by the courts to personal documents, the business records of a sole proprietorship should not be immune from compelled production for purposes of a criminal investigation. The Government stresses that no showing has been made that any of the documents subpoenaed here were prepared by the appellee, and contends that the items requested are of the type obtained, pursuant to subpoena,

[9] *But see* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra* note 7, at 629-94 (criticizing *In re Grand Jury Proceedings (Johanson)* as "inconsistent with *Fisher*," inasmuch as "the change in fifth amendment jurisprudence seems to leave no room for an exception based on a privacy rationale").

from corporations and partnerships. *See United States v. Osborn*, 561 F.2d 1334, 1338-39 (9th Cir. 1977) (holding that the compelled production of certain of an individual's business documents "involves no testimonial self-incrimination").

Our recent decision in *ICC v. Gould*, 629 F.2d 847 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981), however, would appear to blunt this angle of attack, at least in this Circuit. Although *Gould* is not strictly analogous,[10] the Court there squarely considered the applicability of the fifth amendment privilege with respect to the business records of a sole proprietor. Judge Garth, speaking for the Court, began by quoting *Bellis* to the effect that "[t]he privilege applies to the business records of the sole proprietor or sole practitioner as well as to [his] personal documents." 629 F.2d at 858 (quoting *Bellis*, *supra*, 417 U.S. at 87-88). While recognizing that this "sweeping" *Bellis*-derived-from-*Boyd* rule may have been undercut by *Fisher*, the opinion nonetheless concluded that the rule still was good law:

> [W]here the records are not those of a collective entity, and are not held in a representative capacity, but are rather records of an individual proprietorship not separate or distinct from the sole proprietor, ... neither *Bellis* nor any case to date holds that such records are without the individual proprietor's fifth amendment privilege.

629 F.2d at 859 (footnote omitted). The Court took pains to note that "Fisher, ... Bellis, and the cases cited therein may well presage a trend toward elimination of the fifth amendment privilege for all business records, even when the proprietor is required to produce and thus implicitly authenticate them." Nevertheless, *Gould* declared, "such a final break with *Boyd* is not for us to make. *As we read the*

[10] *Gould* involved the validity of administrative investigatory procedures. Nonetheless, in that part of the opinion with which we are concerned, the Court assumed that the ICC could proceed only to the extent permitted by the fifth amendment. It was necessary, therefore, for the Court to consider the protection afforded by that amendment to a sole proprietor's business records.

Supreme Court's most recent pronouncements, the fifth amendment still affords [a sole proprietor] . . . the same protection for [the proprietorship's] business papers as he claims for his own personal papers." Id. at 859 n.22 (emphasis added). *See also In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 968 (5th Cir. 1981); *In re Oswalt*, 607 F.2d 645, 647-48 (5th Cir. 1979). *Gould*, then, stands for the proposition that an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury.[11]

Furthermore, even if *Johanson* and *Gould* were construed more narrowly than we have read them, compelling the appellee, under the circumstances of this case, to respond to the grand jury's subpoenas would bring about an impermissible incriminating "testimonial communication," as that concept is defined and employed in *Fisher*. To be sure, the documents requested here, like those sought in *Fisher*, were voluntarily prepared, and therefore "cannot be said to contain compelled testimonial evidence" in and of themselves. *See Fisher*, *supra*, 425 U.S. at 409-10. But the Supreme Court in *Fisher* went to great lengths to demonstrate that, in certain situations, the very act of producing subpoenaed records might amount to an incriminating declaration. *See id.* at 410-13; *see also id.* at 430-34 (Marshall, J., concurring in the judgment). And such a situation, we believe, is present in the dispute at bar.

In *Fisher*, the Supreme Court stressed that the accountant's workpapers in the taxpayer's possession did not be-

[11] We recognize that language in *In re* Grand Jury Empanelled (Colucci), 597 F.2d 851, 862 (3d Cir. 1979)—which, it should be realized, predated *Gould*—can be read to limit the availability of the fifth amendment privilege with respect to business records. The *holding* in that case, however—that the business records of a sole proprietor *in the possession of another person* can be subpoenaed by a grand jury—is entirely consistent with the result we reach today. The documents sought by the grand jury here, unlike those demanded in *Colucci*, are in the possession of the appellee; and, clearly, "[i]t is the holder of the papers, rather than the owner, who is subjected to governmental compulsion by a *subpoena duces tecum*, and therefore only the holder of the papers may assert that the *subpoena* violates his right under the Fifth Amendment." 597 F.2d at 862.

long to the taxpayer, were not prepared by him, and did not contain his testimonial declaration. Obviously, such cannot be said about the documents in the present controversy, inasmuch as the papers the appellee seeks to protect belong to him and in all likelihood contain (possibly incriminating) declarations by him. More to the point, however, is the district court's observation that forcing the appellee to produce this papers under the circumstances present here would give rise to "communicative aspects of its own" (quoting *Fisher*, 423 U.S. at 410). The mere act of producing the documents may be considered a communication having testimonial significance as "an admission that the subpoenaed records exist" (quoting *In re Grand Jury Empanelled (Colucci)*, *supra*, 597 F.2d at 861), or as a "belief that the papers are those described in the subpoena" (quoting *Fisher*, 425 U.S. at 410). In *Fisher*, "[t]he existence and location of the papers [was] a foregone conclusion and the taxpayer add[ed] little or nothing to the sum total of the Government's information by conceding that he in fact ha[d] the papers." 425 U.S. at 411; *see also United States v. Praetorius*, 622 F.2d 1054, 1062-63 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980) (ordering production of document because its existence and location were known by the Government). In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist—or that the appellee even is somehow connected to the business entities under investigation[12]—is attempting to compensate for its lack of knowl-

[12] At oral argument, counsel for the appellee asserted that the Government hitherto has been unable to establish a connection between the appellee and the businesses with respect to which documents were sought by the grand jury. To the extent, then, that ordering the appellee to comply with the subpoenas would furnish the United States with a "missing link" in its evidentiary chain—*i.e.*, information that the appellee in fact operates the businesses and holds the bank accounts under review—a further incriminating testimonial communication would arise.

edge by requiring the appellee to become, in effect, the primary information against himself. *See* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, *supra*, at 685 n.23 ("a subpoena duces tecum is the only alternative when authorities are unsure of the existence or the location of evidence"). As we read *Fisher*, however, this the fifth amendment does not permit the Government to do.

Moreover, disclosure would contravene the concern evidenced in *Fisher* that persons not be compelled to authenticate self-incriminating documents. In *Fisher*, the Court noted that the accountant's workpapers could be authenticated only by the accountant; thus, "[t]he documents would not be admissible in evidence against the taxpayer without authenticating testimony" in any event, *Fisher*, 425 U.S. at 413. Here, however, many (although certainly not all) of the subpoenaed records—such as, for example, the ledgers, journals, contracts, correspondence, and memoranda—most likely were prepared by the appellee. The record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation.[13] As the district court observed in this connection,

> the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial, if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [the appellee's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect [the appellee] in subsequent proceedings.

[13] *See In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1055 (1st Cir. 1980) ("In many cases . . . the authentication of the document, which may be proven by an official's testimony that he received them from the individual who prepared and possessed them, will provide a necessary link to incriminating evidence contained in the documents"); United States v. Plesons, 560 F.2d 890, 892-3 (8th Cir. 1977) (incriminating documents that could have been protected, had fifth amendment privilege properly been asserted, were introduced at trial and identified as records seized from the defendant).

Appendix at 98 (footnote omitted). Under these circumstances, we are unable to say, as did the Court in *Fisher*, that responding to the subpoenas "would not appear to represent a substantial threat of self-incrimination." 425 U.S. at 413.

Accordingly, we hold, therefore, that enforcement of these subpoenas would result in a compelled testimonial communication, an outcome neither compatible with the fifth amendment nor consonant with *Fisher*.[14] Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials. For example, many of the records sought from the appellee in this case no doubt could be obtained by the Government from other sources. Similarly, the appellee would have no right to invoke the fifth amendment if the documents involved were not in his actual or constructive possessi n. *Couch v. United States*, 409 U.S. 322 (1973). Nor could he complain if the documents had been prepared by or obtained from a third party, *Fisher*, or if they were seized from his office by investigators bearing valid warrants, *Andresen v. Maryland*, 427 U.S. 463 (1976). In this case, however, the Government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely this sort of expedition that the fifth amendment traditionally has been interpreted to prevent.[15]

[14] *In re* Grand Jury Empanelled (Markowitz), 603 F.2d 469 (3d Cir. 1979), relied upon by the United States, is not to the contrary. That case, following and applying the rule of *Fisher*, found no testimonial communication where an individual was compelled to turn over potentially incriminating business documents which he allegedly held in his capacity as an attorney for certain clients. *id.* at 477. The situation in *Markowitz*, therefore, bears more resemblance to those in *Bellis* (where partnership records were deemed to be held in a representational capacity) and in *Fisher* (where the taxpayer attempted to protect records that he had not prepared and of which he had not retained possession) than it does to the matter under consideration here (inasmuch as the appellee's assertion of the fifth amendment is made in a personal, as opposed to a representational, capacity, and is made with respect to documents allegedly in his possesion and control).

[15] Nothing in the above discussion should be taken to cast doubt upon the district court's holding—which we affirm—that those subpoenaed documents in the appellee's possession which are required ei-

C

Rather than identifying specific documents the production of which might prove to be incriminating, the appellee interposed a fifth amendment objection with respect to all of the documents subpoenaed by the grant jury. In *Gould, supra*, we observed that "a blanket citation of the privilege against self-incrimination will not suffice as a valid claim of the privilege." 629 F.2d at 861. The United States contends that the appellee's "blanket" assertion of any fifth amendment rights he might have violates the rule announced in *Gould*.[16]

There are a number of appropriate responses to the Government's position. *Gould* was a civil case, and the authorities cited therein for the above-quoted proposition also were civil cases. *See, e.g., National Life Insurance Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595, 596 (3d Cir. 1980) ("a witness in a *civil* proceeding may not invoke a blanket fifth amendment privilege") (emphasis added). In the criminal context, however, "the proponent of a fifth amendment privilege is required "to move forward only to the limited extent requisite' to show that the privilege is properly claimed." *In re Grand Jury Empanelled (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979) (quoting *In re United States v. Hoffman Can Corp.*, 373 F.2d 622, 628 (3d Cir. 1967)). More important, the Government already has conceded that all of the papers it seeks are potentially incriminating.[17] Additionally, the appellee contends, and

ther to be kept by law or to be disclosed to a public agency should be produced for the grand jury's inspection. *See* Shapiro v. United States, 335 U.S. 1, 33 (1948); *In re* Grand Jury Proceedings (McCoy), 601 F.2d 162, 168-71 (5th Cir. 1979). Indeed, the appellee does not even contest this point.

[16] The record in this case does not contain a written motion to quash by the appellee. We suggest that future appellate review of questions relating to the possible overbreadth of motions to quash would be greatly assisted if such requests were preserved in written form.

[17] *See* Transcript of proceeding (Jan. 12, 1981), Appendix at 29:

THE COURT: Do you also concede that the documents which you seek will or may incriminate [the appellee]?

MR. ULWICK (for the United States): Yes, your Honor.

correctly we believe, that even if he originally did advance a blanket objection, in any event that problem no longer remains, inasmuch as the district court compelled the production of all records required to be kept by law, thereby reducing the contested documents to those business records kept privately by the appellee and alleged by the Government to be incriminating. In sum, it is our view that, in the context of the present dispute, the appellee did not improperly assert his fifth amendment rights.[18]

D

Finally, the United States argues that the district court erred in not compelling the appellee to produce the subpoenaed documents subject to "the functional equivalent of use immunity with respect to the act of production." Under this arrangement, presumably the appellee would turn over the requested records to the Government, which in turn would be obligated not to use the appellee's act of production against him in any way.

We are unpersuaded by the Government's proposition. As the appellee stresses, although the Government, on a number of occasions, suggested to the district court that there were means by which the appellee's act of production could be immunized, no procedure ever was agreed upon and no formal immunization offer under 18 U.S.C. § 6002 or § 6003 was advanced. Given this failure on the part of the Government to identify with particularity the immunity

[18] Although the point may be obvious, we note that this appeal does not involve the question of the appropriate showing required of an individual who invokes the fifth amendment in response to a court order directing the production of documents, thereby risking the possibility of that person's citation for civil contempt. *See, e.g.*, United States v. Rylander, 656 F.2d 1313, 1318-20 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3858 (U.S. Apr. 26, 1982).

proposal it envisioned,[19] we cannot say that the district court erred in rejecting this approach, especially in view of the court's finding that "the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial." Appendix at 98; *see United States v. Garcia*, 544 F.2d 681, 685 n. 4 (3d Cir. 1976).

Because "no party requested the district court to award such immunity," and in view of the Court's traditional reluctance "to intrude into an area which should be more appropriately left to prosecutorial discretion," *see In re Grand Jury Matter*, 673 F.2d 688, 695-96 (3d Cir. 1982) (Sloviter, J., concurring),.we decline to reach the more general question whether an award of use immunity by the Government, designed to override an individual's fifth amendment privilege with respect to potentially incriminating documents in his possession, is permissible under the Constitution.[20]

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[19] Even on this appeal, the United States has described only vaguely the contours of any such immunity arrangement. In its brief, the appellant argues that the possibility.

> the grand jury would draw adverse inferences from [the appellee's] act of production ...*could* be eliminated ... by requring [the appellee] to turn over the documents to the district court, to the prosecutor, a federal agent, *or* his own attorney ... *Alternatively*, the grand jury *could* be instructed by the court or by the prosecutor to draw no inferences from the act of production.

Brief for Appellant at 16-17 (emphasis added).

[20] *See In re* Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1056-59 (1st Cir. 1980) (remanding to allow prosecution opportunity to immunize authentication implicit in the act of production of documents); *see also* Note, *supra* note 9, at 688-92 (commenting favorably on the First Circuit's immunity approach). It could be argued, however, that the immunity arrangement emphasizes only the authentication concern identified in *Fish*, while misprizing the concern that on occasion the act of production itself could constitute a testimonial communication. Justice Marshall elaborated upon this point in his *Fisher* concurrence:

> The Court's theory will also limit the prosecution's ability to use documents secured through a grant of immunity. If authentication that the document produced is the document demanded were the only testimony inherent in production, immunity would be a

III

For the foregoing reasons, the order of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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useful tool for obtaining written evidence ... The Court's recognition that the act of production also involves testimony about the existence and possession of the subpoenaed documents mandates a different result. Under the Court's theory, if the document is to be obtained the immunity grant must extend to the testimony that the document is presently in existence. Such a grant will effectively shield the contents of the document.

Fisher, supra, 425 U.S. at 433-34 (Marshall, J., concurring in the judgment).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1782

IN THE MATTER OF: GRAND JURY EMPANELLED
MARCH 19, 1980
UNITED STATES OF AMERICA, APPELLANT

**SUR PETITION FOR REHEARING
EN BANC**

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*, and VAN ARTSDALEN, *District Judge**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons dissents from the denial.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: Aug. 10, 1982

* Hon. Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Miscellaneous No. 80-53

[Original filed February 4, 1981]

IN THE MATTER OF THE
GRAND JURY EMPANELLED
MARCH 19, 1980

SAROKIN, District Judge

Appearances:

WILLIAM W. ROBERTSON, United States Attorney
By JAMES P. ULWICK, Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102

CHECKI AND POLITAN, ESQS.
Attorneys for [John Doe]
By GLENN T. LEONARD, ESQ.
37 Park Avenue
Lyndhurst, New Jersey

The court has been called upon to determine the extent to which the Fifth Amendment allows the target of a grand jury investigation to resist the production of business records sought by the grand jury by a subpoena *duces tecum*. The issue arises upon the motion of the target [John Doe] to quash five subpoenas directing him to turn over documents and records relating to the operation of several businesses of which he is the sole proprietor. For the reasons stated below, the motion is granted in part and denied in part.

I. *BACKGROUND*

In the fall of 1980, a United States Grand Jury began an investigation into alleged fraudulent activity relating to the submission of bids, bid bonds, and price quotes by various

companies to Hudson County and municipal entities of Hudson County. In addition, the grand jury is delving into the awarding of bids and contracts by Hudson County and the municipalities to these companies, and the alleged diversion of income by these companies to circumvent the Internal Revenue laws. The investigation to date has centered around the involvement of Mr. [Doe] and of his several companies which do business with these municipal entities. Each of the companies involved is a sole proprietorship owned by Mr. [Doe].

On November 19, 1980, the grand jury issued two subpoenas to Mr. [Doe] requiring production of (1) the telephone toll records of several companies of which he is a principal, and (2) "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four accounts held by Mr. [Doe] or his companies.

On November 25, 1980, the grand jury issued a subpoena to Mr. [Doe] calling for production of "any and all records as per the attached Schedule A for [a named company] for the period January 1, 1976 to present." Schedule A lists twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices; payroll records, contracts and copies of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee and workpapers. Another subpoena was issued on December 19, 1980, seeking access to a laundry list of documents relating to [a named company].

Finally, on December 29, 1980, the grand jury directed [Doe] to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of his companies maintained at an off-shore bank.

Mr. [Doe] is resisting production of these documents and has filed the instant application to quash the five subpoenas, relying upon his Fifth Amendment right against self-incrimination.[1]

[1] Mr. [Doe] does not rely upon the Fourth Amendment in resisting the subpoenas. *Cf. United States v. Miller, 425 U.S. 435 (1976) (no legitimate expectation of privacy in bank statements or in negotiable instruments used in commercial transactions).*

II. *DISCUSSION.*

The Fifth Amendment provides that "No person shall be compelled in any criminal case to be a witness against himself." Although the Fifth Amendment does not protect the records of corporations, unincorporated associations or partnerships, a sole proprietor can invoke the privilege to his benefit. *Bellis v. United States*, 417 U.S. 85, 87-88 (1974); *I.C.C. v. Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980); *In Re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 859 (3d Cir. 1979); *United States v. Doe*, 628 F.2d 694, 695 (1st Cir. 1980); *In Re Grand Jury Proceedings*, 601 F.2d 162, 166 (5th Cir. 1979). Because the documents and records pertain to businesses owned by Mr. [Doe] as sole proprietor, the court must determine whether the Fifth Amendment rights of Mr. [Doe] would be infringed by enforcement of the grand jury subpoenas.

The Fifth Amendment is implicated in a claim of privilege relating to the production of business records only when an individual "is compelled to make a testimonial communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). Therefore, before a district court may quash a subpoena directing the production of documents or records, it

> "must be satisfied that three requirements have been met: (1) *compulsion* of a (2) *testimonial communication* that is (3).*incriminating.*

In Re Grand Jury Empanelled (Colucci), 597 F.2d 851, 860 (3d Cir. 1979) (empha is in original). Because the subpoena supplies the compulsion and it is conceded by the government that the material sought is or may be incriminating, the focus in this case is on the second requirement—that there be a testimonial communication.

In so focusing, the relevant inquiry is not whether the subpoenaed documents on their face reveal incriminating communications, but whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher v. United States*, 425 U.S. 391 (1976). In yielding to the command of the subpoena, Mr.[Doe] may be required to make any one of several communications. The mere act of producing the documents may

be considered "a communication of testimonial significance as an admission that the subpoenaed records exist and that they are authentic." *In Re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 861 (3d Cir. 1979); *Andresen v. Maryland*, 427 U.S. 463, 475 (1976) ("the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information."). In addition, the act of production may indicate a belief that the papers produced are those described in the subpoena. *Fisher*, 425 U.S. at 410.

With few exceptions, enforcement of the subpoenas would compel Mr. [Doe] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate Mr. [Doe's] Fifth Amendment rights.

The government insists, however, that it has no need for the testimony of Mr. [Doe] to prove the possession, existence or authenticity of the documents, and that his Fifth Amendment rights are therefore not involved. If the act of production is testimonial, it does not cease to be so because of independent proof of the communications contained therein. Mr. [Doe's] constitutional rights should not rise or fall with the strength of the government's case. Moreover, the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against Mr. [Doe] either before the grand jury or at a subsequent trial, if he is indicted.[2] The government argues that the existence, possession and authenticity of the documents can be proved without Mr. [Doe's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings. Because the court concludes that use of this testimony against Mr. [Doe] for any

[2] The government's position is that although Mr. [Doe's] testimony would not be needed in proving authentication, existence or possession of said documents, the communications nevertheless would be a proper subject of cross-examination at trial, if Mr. [Doe] decided to testify in his own behalf.

purpose would infringe his right against self-incrimination, the motion to quash the subpoena is, for the most part, granted.

There are a number of items requested by the grand jury for which the Fifth Amendment does not offer protection. Records and documents which are required by law to be kept, or to be disclosed to a public agency, are outside the scope of constitutional protection. *In Re Grand Jury Proceedings*, 601 F.2d 162, 168 (5th Cir. 1979). Therefore, insofar as the subpoenas demand the production of documents falling into this category, e.g. tax returns and W-2 statements, Mr. [Doe] must comply. The motion to quash in all other respects is granted.

/s/ H. Lee Sarokin

H. LEE SAROKIN
United States District Judge

Date: February 4, 1981

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Room 730, Federal Building, 970 Broad St., in the city of Newark on the 3rd day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all telephone toll records for [five named companies] for the period January 1, 1977 to present.

This subpoena is issued on application of the United States.

William W. Robertson
United States Attorney

BY: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(201) 645-6556
November 19, 1980

ANGELO W. LOCASCIO
Clerk.

By /s/ JEAN CHERUBINI
Deputy Clerk

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

Dear Witness:

The attached is a subpoena for your appearance before the Federal Grand Jury in Newark, New Jersey, which is investigating alleged violations of Title 18, United States Code, and Title 26, United States Code.

You have been subpoenaed as a witness in the belief that you may have information which will aid the Grand Jury in its investigation. Department of Justice policy requires that all witnesses be advised of the following:

> You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
>
> Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.
>
> If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the Grand Jury room to consult with counsel if you do desire.
>
> If you have any questions, please do not hesitate to contact Michael B. Himmel, AUSA at 645-6556.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Newark, N.J. Federal Building, 970 Broad Street, Rm. 730 in the city of Newark on the 3rd day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present for the accounts listed on the attached Schedule A.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney

BY: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(202) 645-6556
Novemmber 19, 1980.

ANGELO W. LOCASCIO
Clerk.

/s/ JEAN CHERUBINI
Deputy Clerk.

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE A

1. Banco De Santander-Puerto Rico
   Account # [* * * * *]
   Entitled [a named company]
   c/o Mrs. [John Doe] and/or [John Doe] P.O. Box [* * * * *],
   Mayaguez, Puerto Rico 00708
2. Royal Bank of Canada-Puerto Rico
   Account # [* * * * * and * * * * *]
   Entitled [a named company]
   P.O. Box [* * * * *], Mayaguez, Puerto Rico 00708
3. Banco De San Juan-Puerto Rico
   Account # [* * * * *]
   Entitled [a named company],
   [* * * * *], Hato Pey, Puerto Rico 00918
4. Banco De Santander-New York, New York
   Account # [* * * * *]

[Same Warning as on page 29a, *supra*]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

---

to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Federal Building, 970 Broad St., Room 730 in the city of Newark on the 17th day of December 1980 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all records as per the attached Schedule A for [a named company] for the period January 1, 1976 to present.

This subpoena is issued on application of the United States

WILLIAM W. ROBERTSON,
United States Attorney
By: MICHAEL B. HIMMEL,
Assistant U.S. Attorney
970 Broad St., Newark, NJ
201/645-6556

DATE NOVEMBER 25, 1980

ANGELO W. LOCASCIO
Clerk.
BY JEAN CHERUBINI
Deputy Clerk

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE "A"

1. General ledgers
2. General journals
3. Cash disbursement journals
4. Petty cash books and vouchers
5. Purchase journals
6. Vouchers
7. Paid bills
8. Invoices
9. Cash receipts journal
10. Billings
11. Bank statements
12. Cancelled checks and check stubs
13. Payroll records
14. Contracts and copies of contracts, including all retainer agreements
15. Financial Statements
16. Bank deposit tickets
17. Retained copies of partnership income tax returns
18. Retained copies of payroll tax returns
19. Accounts payable ledger
20. Accounts receivable ledger
21. Telephone company statement of calls and telegrams, and all telephone toll slips.
22. Records of all escrow, trust or fiduciary accounts maintained on behalf of clients
23. Safe deposit box records
24. Records all purchases and sale of all stocks and bonds.
25. A complete list of all partners, associates and employees, together with their home addresses.
26. All W-2 forms of each partner, associate and employee
27. Workpapers.
28. Copies of Tax Returns

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

To [a named company]
Attn: Any authorized Officer or Representative

You are hereby commanded to appear in the United States Court for the District of New Jersey at Federal Building, 970 Broad Street—Rm. 730 in the city of Newark on the 12th day of January 1981 at 10:00 o'clock A.M. to testify before the Grand Jury and being with you[1] any and all books, records and documents as per the attached Schedule A for the period January 1, 1976 to present.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney

By: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., Newark, N.J. 07102
(201) 645-6556

ANGELO W. LOCASCIO
Clerk

By /s/JEAN CHERUBINI
Deputy Clerk

Date: DECEMBER 19, 1980

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things in which case the document and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

SCHEDULE "A"

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Cash receipts journals.
5. Vouchers.
6. Paid bills.
7. Invoices.
8. Billings.
9. Bank Statements.
10. Cancelled checks and check stubs.
11. Payroll records.
12. Contracts and copies of contracts.
13. Subcontracting agreements and purchase orders.
14. Financial statements.
15. Bank deposit tickets.
16. Retained copies of income tax returns.
17. Retained copies of payroll tax returns.
18. Purchase journals.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Stock transfer book.
22. Corporate minutes.
23. Corporate charter.
24. Correspondence and memoranda.
25. Bids, Bid Bonds and contracts.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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to [John Doe]

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Federal Building, 970 Broad Street—Rm. 730 in the city of Newark on the 7th day of January 1981 at 10:00 o'clock A.M. to testify before the Grand Jury and bring with you[1] any and all bank statements and cancelled checks for the period January 1, 1976 to present for the accounts of [two named companies] at the Royal Bank of Canada, Georgetown, Grand Cayman Islands.

This subpoena is issued on application of the United States.

WILLIAM W. ROBERTSON
United States Attorney
By: MICHAEL B. HIMMEL
Assistant U.S. Attorney
970 Broad St., New York, N.J. 07102
(201) 645-6556

ANGELO W. LOCASCIO
Clerk
By /s/ JEAN CHERUBINI
Deputy Clerk

Date: DECEMBER 29, 1980

[1]Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN [OMITTED]

[Same warning as on page 32a, *supra*]

Office - Supreme Court, U.S.
FILED
AUG 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
(Counsel of Record for Petitioner)

RICHARD T. PHILLIPS
DeCotiis and Philips
13 Hutton Avenue
West Orange, New Jersey 07052
(201) 731-0813
(Counsel of record for respondent)

PETITION FILED: November 8, 1982
CERTIORARI GRANTED: May 2, 1983

TABLE OF CONTENTS*

District court docket sheets 1

Jan. 12, 1981 Tr. (argument on respondent's motion to quash) 19

Jan. 26, 1981 Tr. (further argument on respondent's motion to quash) 25

Feb. 27, 1981 Tr. (argument on government's motion for reconsideration) 30

Order Allowing Certiorari 40

*The opinions of the Court of Appeals and the district court appear at pp. 1a-21a, and 23a-27a of the appendix to the petition for writ of certiorari and have not been reproduced.

RELEVANT DOCKET ENTRIES

In the Matter of: Grand Jury Empanelled March 19, 1980

Docket: Misc. 80-53

DATE	FILINGS—PROCEEDINGS
4-9-80	Ordered minutes and record sealed. (Biunno) (4-2-80)
4-11-80	Ordered minutes and stenographic notes sealed. (Biunno) (4-9-80)
4-24-80	Copy of CJA Order appointing Pamela A. Falls, Esq., counsel for grand jury witness Victor Daniel Martinez, filed 4-23-80. (Perretti)
5-2-80	Copy of Voucher of Pamela A. Falls, Esq., for compensation and expenses on behalf of VICTOR DANIEL MARTINEZ filed 5-1-80. (Perretti)
5-14-80	Notice of Motion to quash grand jury subpoenas, etc., ret. 5-14-80, memorandum of law, and acknowledgment of service filed. * * * *
5-14-80	Ordered minutes, motion and court reporter's notes impounded until further order of court. (Meanor) (5-14-80$
5-16-80	Petition and Order for writ of habeas corpus re Michael Masucci filed 5-15-80. (Meanor)
5-16-80	Writ re Michael Masucci issued.
5-29-80	Petition and Order for writ of hebeas corpus re William A. Drennen filed 5-28-80. (Meanor)
5-29-80	Writ re William A. Drennen issued.
6-2-80	Affidavit and Order granting U.S. leave to disclose certain grand jury transcripts with sealing order filed 5-29-80. (Meanor) * * *
6-16-80	Notice of motion by Ernst Orthopedics, Inc. for an order quashing a subpoena duces tecum ret. 7-14-80, statement in lieu of brief and certificate of service, filed 6-13-70.
6-16-80	Affidavit of Peter R. Sarasohn, filed 6-13-80.
6-17-80	Notice of disclosure of matters occurring before grand jury with sealing order filed 6-16-80. (Meanor)

6-19-80 Notification of disclosure of matters occurring before grand jury with sealing order, filed 6-16-80. (Coolahan)

6-20-80 Order to show cause re compliance by Ernst Orthopedics, Inc., with Grand Jury subpoena, returnable 6-24-80 filed 6-19-80. (Coolahan)

6-20-80 Affidavit of Robert S. Bonney, Jr., filed 6-19-80.

6-20-80 Verified Petition, filed 6-19-80.

6-25-80 Hearing on application of U.S. why Ernst Orthopedics Inc. should not comply with Grand Jury subpoena served on May 29th, 1980. Ordered Ernst Orthopedics Inc. comply with subpoena upon return from Europe of the individual involved. Order to be submitted. (Coolahan) (6-24-80)

7-2-80 Copy of writ issued 5-29-80 re William A. Drennen with Marshal's return filed 7-1-80.

7-7-80 Notification of disclosure of matters occurring before the grand jury with sealing order filed 6-30-80. (Whipple) * * * *

7-11-80 Notification of disclosure of matters occurring before the grand jury with sealing order filed 7-7-80. (Whipple) * * *

7-8-80 Order for compliance with grand jury subpoena served upon Ernst Orthopedics, Inc. filed 7-8-80. (Coolahan)

7-16-80 Notification of disclosure of matters occurring before grand juries with sealing order filed 7-14-80. (Whipple)* * *

7-31-80 Order to show cause re judgment of civil contempt against Ernst Orthopedics, Inc. for failure to comply with court order of 7-8-80, ret. 7-30-80, filed 7-28-80. (Whipple) Notice mailed.

7-31-80 Verified petition, re judgment of civil contempt against Ernst, filed 7-28

7-31-80 Affidavit of Robert S. Bonney, Jr., filed 7-28-80.

7-31-80 Notification of disclosure of matters occurring before the grand jury with sealing order, filed 7-30-80. (Whipple) * * *

8-4-80 Hearing on government's application to hold witness, Ernst Orthopedics, Inc., in contempt of Court for failure to comply with Court Order to produce certain documents before the Grand Jury. Ordered application granted. (Whipple) (7-31-80)

8-4-80 Order holding Ernst Orthopedics, Inc. in civil contempt for failure to comply with court order of 7-8-80, etc., and denying request of Ernst Orthopedics, Inc. for stay, filed 7-31-80. (Whipple) Notice mailed.

8-6-80 Petition and order pursuant to Rule 6(e) and sealing order, filed 8-5-80. (Fisher) * * *

8-6-80 Affidavit, order and sealing order, filed. (Fisher) * * *

8-7-80 Ordered minutes impounded. (Fisher) (8-6-80)

8-19-80 Transcript of hearing taken on 7-31-80, filed 8-18-80.

8-21-80 Notice of motion of Disbrok Trading Co., Inc. and Fred Distenfeld for order quashing a grand jury subpoena or alternatively modifying subpoena and limiting disclosure of any documents, returnable 8-21-80 etc. filed 8-20-80. (brief submitted)

8-21-80 Affidavit of Charles S. Crandall filed.

8-22-80 Ordered minutes sealed. (Fisher) (8-21-80)

9-4-80 Hearing re penalty for civil contempt as to Ernst Orthopedics, Inc. Ordered penalty of $250.00 per day if documents are not produced by September 10, 1980. (Whipple) (9-3-80)

9-4-80 Hearing on application of Ernst Orthopedics, Inc., for stay. Ordered application denied. Order to be submitted. (Whipple) (9-3-80)

9-5-80 Order directing Ernst Orthopedics, Inc. to appear before the grand jury on Sept. 10, 1980 and produce documents or pay a fine of $250.00 a day to Clerk of the Court, etc.; and denying request for stay, filed 9-4-80. (Whipple)

9-9-80 Petition and Order for writ of habeas corpus re Anthony Pionzio filed. (Lacey)

9-8-80 Writ re Anthony Pionzio issued.

9-10-80	NOTICE OF APPEAL OF Ernst Orthopedics, Inc. filed 9-8-80, at 1:10 p.m.
9-10-80	Copies of Notice of Appeal of Ernst Orthopedics, Inc. sent to USCA, and U.S. Attorney. (USCP 80-2265)
9-11-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-9-80. (Lacey)* * *
9-15-80	RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)
9-16-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-11-80. (Lacey)* * *
9-16-80	Notification of disclosure of matters occurring before grand juries with sealing order filed 9-11-80. (Lacey)* * *
9-17-80	Transcript of Sept. 3, 1980, proceedings before Judge Whipple re Ernst Orthopedics, Inc. filed 9-15-80.
9-17-80	Order granting motion of Disbrok Trading Company, Inc. and Fred Distenfeld to quash subpoena except that they are required to produce records relating to Meg Import Corporation, et al, filed 9-16-80. (Fisher)
9-19-80	Motion of U.S. to compel Anthony Pionzio to give testimony filed 9-17-80. (No Brief)
9-18-80	Hearing on government's application for Court to grant immunity to Anthony Pionzio. Ordered application granted. (Lacey) (9-17-8)
9-19-80	Order compelling Anthony Pionzio to testify filed 9-17-80. (Lacey)
9-22-80	USCA Order granting motion of Ernst Orthopedics, Inc. for stay of enforcement of order and judgment in civil contempt, etc., filed 9-18-80.
9-23-80	ERNST ORTHOPEDICS, INC.—FIRST SUPPLEMENTAL RECORD ON APPEAL SENT TO USCA. (Notice mailed)

9-29-80 Hearing on application of Jerome Landzert to be excused from grand jury service as of the close of business on October 1, 1980. Ordered application granted. (Lacey) (9-24-80)

9-29-80 Copy of writ issued Sept. 8, 1980 re Anthony Pionzio with Marshal's return filed.

9-29-80 Order permanently excusing grand juror Robert Tamburri and directions that a replacement panel be summoned filed 9-26-80. (Lacey)

9-30-80 Affidavit filed.* * *

9-30-80 Order permanently excusing grand juror Jerome Landzert and directing that a replacement panel be summoned filed 9-29-80. (Lacey)

10-1-80 Notice of Motion of witness Frank Scarafile to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness John J. Powers, Esq., pro se, to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness Robert Menendez to quash or limit subpoena, brief and acknowledgment of service, filed 9-30-80.

10-1-80 Notice of Motion of witness John Bertoli to quash or limit subpoena brief and acknowledgment of service, filed 9-30-80.

10-1-80 Notice of Motion of witness William Musto to quash or limit subpoena, brief and acknowledgement of service, filed 9-30-80.

10-1-80 Notice of Motion of witness Richard Van Nortwick to quash subpoena, brief and proof of service filed.

10-1-80 Notice of Motion of U.S. to disqualify firm of Lewis and DeClemente from representing John Powers, John Bertoli, Frank Scarafile and/or Robert Menendez, filed. (No Brief)

10-1-80 Notice of Motion of John Powers, President, Union City Board of Education to quash or limit subpoena, brief and acknowledgment of service, filed.

10-3-80 Hearing on application of John Powers, pro se, joined by Menendez, Bertoli and Scarafile for recusal of Judge. Ordered hearing continued to October 3, 1980. (Stern) (10-1-80)

10-3-80 Notification of disclosure of matters occuring before the grand juries with sealing order filed 10-2-80. (Stern)* * *

10-3-80 Transcript of hearing taken on 10-1-80, filed 10-2-80.

10-6-80 Continued hearing on application of John Powers, pro se, joined by Menendez, Bertoli and Scarafile for recusal of Judge. Ordered application denied. (Stern) (10-3-80)

10-6-80 Hearing on government's application to release from impoundment affidavits of Gary F. White and James G. Cole. Ordered application granted. (Stern) (10-3-80)

10-6-80 Hearing on application of government to disqualify Lewis & DeClemente, Esqs. DECISION RESERVED. (Stern) (10-3-80)

10-6-80 Affidavit of Gary F. White, filed 10-3-80.

10-6-80 Affidavit of James G. Cole, filed 10-3-80.

10-6-80 Affidavit, filed 10-3-80.* * * (see Misc. 79-75)

10-6-80 Order re disclosure, filed 10-3-80. (Stern) * * * (See Misc. 79-75)

10-6-80 Order sealing affidavit and order re disclosure, filed 10-3-80. (Stern) * * * (See Misc. 79-75)

10-6-80 Affidavit of Mark J. Malone, filed 10-3-80.

10-6-80 Affidavit of Samuel Rosenthal, filed 10-3-80.

10-7-80 Notification of disclosure of matters occurring before the grand juries with sealing order, filed 10-6-80. (Stern) * * *

10-8-80 At call for hearing on motion of Richard Van Nortwick to quash subpoena, counsel indicated motion withdrawn. (Stern) (10-7-80)

10-8-80 Hearing on renewed application of Bertoli for recusal of Judge. Ordered application denied. (Stern) (10-7-80)

10-8-80 Continued hearing on application of government to disqualify the Law firm of Lewis & De Clemente, Esqs. Ordered application granted. Ordered firm of Lewis & DeClemente, Esqs. from representing anyone in these proceedings. (Stern) (10-7-80)

10-8-80 Hearing on application of Lewis & DeClemente, Esqs., by Thomas De Clemente, Esq. for a stay. Ordered application denied. (Stern) (10-7-80)

10-8-80 Ordered Compliance with subpoenas as to Bertoli and Scarafile stayed until October 21, 1980. (Stern) (10-7-80)

10-8-80 Affidavit of Richard Bertoli, filed 10-7-80.

10-8-80 Affidavit of Thomas A. De Clemente, filed 10-7-80.

10-8-80 Affidavit of John Bertoli, filed 10-7-80.

10-8-80 Notification of disclosure of matters occuring before the grand jury with sealing order, filed 10-7-80. (Stern) * * *

10-9-80 Hearing on application of John Powers to quash subpoena. Ordered application adjourned to October 14, 1980. (Stern) (10-8-80)

10-9-80 Hearing on application of William Musto to quash subpoena. Ordered application granted in part and denied in part. (Stern) (10-8-80)

10-9-80 Notification of disclosure of matters occurring before Grand jury with sealing order, filed 10-8-80. (Stern)* * *

10-10-80 Transcript of hearing taken on 10-3-80, filed.

10-10-80 Transcript of hearing taken on 10-7-80, filed.

10-10-80 Transcript of hearing take on 10-3-80, filed.

10-15-80 Continued hearing on application of John Powers to quash subpoenas. Ordered application granted in part, denied in part. (Stern) (10-14-80)

10-17-80 Order disqualifying firm of Lewis & DeClemente from representing any party or witness in connection with grand jury investigation, and denying motion of Thomas DeClemente, Esq. for a stay of order, filed 10-15-80. (Stern) Notice mailed.

10-17-80 Affidavit of Frank J. Scarafile, filed 10-15-80.

10-17-80 Affidavit of John Bertoli, filed 10-15-80.

10-17-80 Affidavit of Samuel Rosenthal, filed 10-15-80.

10-17-80 Affidavit of William W. Robertson, filed 10-15-80.

10-20-80 Notification of disclosure of matters occurring before grand juries with sealing order, filed 10-16-80. (Stern)* * *

10-20-80 Notification of disclosure of matters occurring before grand juries with sealing order, filed 10-16-80. (Stern)* * *

10-21-80 At call for continued hearing on application of witness, Frank Scarafile to quash subpoena; Frank Scarafile indicated application withdrawn. (Stern) (10-20-80)

10-21-80 Hearing on motion of Mickey Borack to quash subpoena. Ordered motion granted in part, denied in part. (Stern) (10-20-80)

10-21-80 Notification of disclosure of matters occurring before grand juries with sealing order filed 10-20-80. (Stern)* * *

10-22-80 Affidavit of AUSA Mark J. Malone re subpoena served on Mayor William Musto filed 10-21-80.

10-22-80 Motion of witness MIckey Borack to quash or limit a subpoena duces tecum filed 10-20-80.

10-23-80 Hearing on application of government (No Brief) (see, 10-21-80) to surrender certain documents to the grand jury or the Clerk under seal. Ordered hearing continued to October 29, 1980. (Stern) (10-21-80)

10-23-80 Motion of U.S. re immunization of witness Raymond Peto and to compel testimony filed 10-22-80. (No Brief)

10-23-80 Hearing on application of government to compel Raymond Peto to testify before the grand jury. Ordered application granted. (Stern) (10-22-80)

10-23-80 Order compelling witness Raymond Peto to testify before the grand jury filed 10-22-80. (Stern)

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of Frank Scarafile re electronic surveillance filed 10-22-80.

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of William Musto's re electronic surveillance filed 10-22-80.

10-23-80 Affidavit of AUSA Mark J. Malone in response to request of John Powers re electronic surveillance filed 10-22-80.

10-24-80 Order granting in part and denying in part motion of witness John J. Powers to limit subpoena filed. (Stern)

02-28-80 Hearing on government's application to compel Scipio L. Africano to testify before the Grand Jury. Ordered hearing continued to November 4, 1980. (Stern) (10-27-80)

10-29-80 NOTICE OF APPEAL OF witnesses Frank Scarafile and John Bertoli from Order (entered Oct. 17, 1980) disqualifying their counsel, Thomas A. DeClemente, Esq., from representing them filed 10-27-80, at 8:30 a.m.

10-29-80 Copies of Notice of Appeal of Frank Scarafile and John Bertoli sent to USCA and U.S. Attorney.

10-30-80 Transcript of hearing taken on 10-20-80, filed 10-29-80.

10-30-80 Motion of U.S. for an order compelling Mounir Hazzan to testify before the Grand Jury, filed 10-29-80.

10-31-80 Hearing on government's motion to compel testimony from Mounir Hazzan before the Grand Jury. Ordered motion granted. Order submitted. (Stern) (10-29-80)

10-31-80 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)

11-3-80 Order compelling Mounir Hazzan to testify before the grand jury filed 10-29-80. (Stern)

11-3-80 Motion of I. Spiegel to quash grand jury subpoena returnable November 5, 1980, filed. (No Brief)

11-5-80 Certified copy of USCA Order discharging rule to show cause entered against U.S. and directing U.S. to exchange original records produced by Ernst Orthopedics, Inc. for copies, etc., filed 11-3-80.

11-6-80 Transcript of October 21, 1980, hearing before Judge Stern, re William Musto, filed 11-5-80.

11-6-80 Transcript of October 27, 1980, hearing before Judge Stern, re Union City Board of Education, filed 11-5-80.

11-6-80 Motion of Art Metal-U.S.A., Inc. to quash subpoena or for a protective order, proof of service, filed 11-5-80. (No Brief)

11-6-80 Ordered hearing on application of Art Metal U.S.A. to quash subpoean duces tecum or in the alternative for a protective order adjourned to Nov. 10, 1980, before Judge Stern. (Lacey) (11-5-80)

11-6-80 Hearing on motion of I. Spiegel to quash subpoena. Ordered hearing continued to November 10, 1980. (Stern) (11-5-80)

11-12-80 Motion of U.S. for Order to Show Cause holding witness William E. Slater in contempt for not fully complying with grand jury subpoena, proof of service, filed 11-7-80. (No Brief)

11-12-80 Certified copy of USCA Order amending USCA Order (entered 11-5-80) in that U.S. is permitted to retain original documents, if needed for laboratory or handwriting analysis, produced by Ernst Orthopedics, Inc., etc., filed 11-10-80.

11-13-80 Ordered grand jury minutes sealed. (Fisher) (11-12-80)

11-13-80 Affidavit filed 11-12-80.* * * *

11-18-80 Motion of Art Metal-U.S.A. Inc. to quash subpoean duces tecum or for a protective order, memorandum of law, proof of service, filed 11-14-80.

11-18-80 Transcript of hearing held Oct. 30, 1980, before Judge Biunno, filed 11-14-80.* * *

11-18-80 Continued hearing on motion of I. Spiegel to quash subpoena. Counsel indicated consent order to be submitted. (Stern) (11-17-80)

11-18-80 Hearing on motion of Art Metals to quash subpoena. Counsel indicated consent order to be submitted. (Stern) (11-17-80)

11-18-80 Order compelling Hugh Dietz to provide finger-
Hearing on motion of Art Metals to quash subpoe-
photographed and directing that they be placed in sealed envelope and deposited with Clerk filed 11-17-80. (Fisher)

11-18-80 Letter of S. Kenneth Jacobson, M.D. re grand jury witness Isadore Spiegel's copetency to testify filed 11-17-80.

11-20-80 Hearing on application of Government to grant immunity to Merle Betskoff. Ordered application granted. (Whipple) (11-19-80)

11-20-80 Waiver of counsel by witness, Merle Betskoff filed 11-19-80.

11-20-80 Motion of U.S. for order compelling Merle Betskoff to give testimony and other information, etc. filed 11-19-80.

11-20-80 Order directing Merle Betskoff to give testimony and other information before Grand Jury filed 11-19-80. (Whipple)

11-21-80 Order denying motion of U.S. for order to show cause and motion of Art Metal-U.S.A. Inc. to quash subpoena and granting motion of Art Metal-U.S.A. Inc. for protective order, filed 11-20-80. (Stern)

1-25-80 Transcript re holding grand jury witness in contempt, filed.

1-25-80 Transcript re fifth amendment of witness, filed.

12-3-80 Transcript re immunity hearing of Merle Betskoff, filed 12-2-80.

2-4-80 Motion of I. Spiegel for reconsideration of motion to quash subpena and proof of service filed 12-3-80. (brief submitted)

2-10-80 Notification of disclosure of matters occurring before the Grand Jury with sealing order filed 12-9-80. (Fisher) * * *

2-10-80 Motion filed. (Released 3-3-81)

2-10-80 Order filed. (Fisher) (Released 3-3-81)

12-11-80 Motion of U.S. filed 12-10-80. * * *

12-11-80 Order filed 12-10-80. (Fisher) * * *

12-11-80 Ordered minutes, motion, order and reporter's notes sealed. (Fisher) (12-10-80)

12-11-80 Transcript of proceedings held on 11-17-80 for Art Metals filed 12-10-80.

12-11-80 Transcript of proceedings held on 11-17-80 for Irving Spiegel filed 12-10-80.

12-11-80 Certified copy of order from U.S.C.A. re motions for modification of orders pursuant to Rule 35 F.R.A.P., etc. filed 12-10-80.

12-15-80 Affidavit of service of copy of affidavit and brief by U.S. filed 12-12-80.

12-17-80 Motion of U.S. re immunization of witness Rima Saad and to compel testimony, filed.

12-17-80 Order compelling witness Rima Saad to testify before grand jury, filed. (Stern)

12-18-80 Motion of United States of America for an order to show cause why Isadore Spiegel should not be held in contempt for failure to comply with Grand jury summons, filed 12-17-80. (Brief submitted)

12-19-80 Hearing on government's application to compel testimony of Rima Saad. Ordered application granted. Order submitted. (Stern) (12-17-80)

12-22-80 Notification of disclosure of matters occurring before grand jury with sealing order filed 12-19-80. (Fisher) * * *

12-24-80 Hearing on motion by U.S.A. for an order to show cause why I. Spiegel should not be held in contempt for failure to comply with Grand Jury subpoena. Ordered hearing continued to January 9, 1981. (Stern) (12-23-80)

2-24-80 Letter of Stephen D. Feldman, M.D. re medical report of Isadore Spiegel, filed 12-23-80.

12-29-80 Order to show cause why Isadore Spiegel should not be held in contempt for failure to obey a grand jury subpoena ret 12-22-80 filed 12-23-80. (Stern)

1-8-81 Ordered motion, order and court stenographers minutes be sealed. (Sarokin) (1-7-81)

1-8-81 Motion and Order filed 1-7-81. (Sarokin) * * *

1-13-81 Continued hearing on motion of United States of America for an order to show cause why Isadore Spiegel should not be held in contempt for failure to comply with Grand Jury subpoena. Ordered Isadore Spiegel held in contempt of court. Ordered Isadore Spiegel do pay a fine of $100.00 per day until compliance with Grand Jury subpoena. (Stern) (1-9-81)

1-18-81 Ordered execution of order imposing fine stayed until January 16, 1981. (Stern) (1-0-81)

1-13-81 Ordered Isadore Spiegel deposit with the Clerk of the Court under seal the documents requested in Grand Jury Subpoena by January 15, 1981. (Stern) (1-9-81)

1-13-81 Order directing Isadore Spiegel to produce record pursuant to subpoena issued on 10-7-80, and directing clerk to keep said records under seal until subpoena becomes final after appeal, filed 1-9-81. (Stern) Notice Mailed.

1-13-81 Order directing Isadore Spiegel to pay the sum of $100.00 per day until compliance with Grand Jury subpoena; and staying order imposing a fine to 1-16-81, filed 1-9-81. (Stern) (Notice Mailed)

1-13-81 Hearing on motion of Milton Reed to quash Grand Jury Subpoena. Decision reserved. (Sarokin) (1-12-81)

1-13-81 Order denying motion of Isadore Speigel to Quash subpoena dated 10-7-80, filed 1-12-81. (Stern) Notice Mailed.

1-13-81 Order denyuing motion of Isadore Speigel for reconsideration of Order denying motion to Quash Subpoena, filed 1-12-81. (Stern) Notice Mailed.

1-14-81 Transcript of proceedings of December 23, 1980, filed 1-13-81.

1-16-81 Motion to compel testimony filed 1-14-81. * * *

1-16-81 Ordered minutes and papers impounded. (Sarokin) (1-14-81)

1-16-81 Order compelling testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Order impounding Order and all moving papers re motion to compel testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Motion to compel testimony filed 1-14-81. * * *

1-16-81 Order minutes and papers impounded. (Sarokin) (1-14-81)

1-16-81 Order compelling testimony filed 1-14-81. (Sarokin) * * *

1-16-81 Transcript hearing before Hon. Herbert J. Stern, on Jan. 9, 1981, re Isadore Speigel, filed 1-15-81.

1-16-81 Continued hearing re contempt of court re Isadore Spiegel. Ordered fine increased to $600.00 per day until compliance with Grand Jury subponea. (Stern) (1-15-81)

1-16-81 Order Amending Contempt Order re Isadore Spiegel increasing fine to $600.00 a day filed 1-15-81. (Stern) Notice mailed

1-16-81 NOTICE OF APPEAL OF ISADORE SPEIGEL from contempt orders entered 1-12-81 and 1-15-81 filed 1-15-81, at 12:45 p.m.

1-16-81 Copies of Isadore Speigel's Notice of Appeal sent to USCA, U.S. Attorney, and Dept. of Justice.

1-16-81 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED) (I. SPEIGEL)

1-19-81 Transcript of January 9, 1981, hearing re Isadore Speigel, filed 1-16-81.

1-19-81 Transcript of January 15, 1981, hearing re Isadore Speigel, filed 1-16-81.

1-19-81 I. SPEIGEL—FIRST SUPPLEMENTAL RECORD ON APPEAL SENT TO USCA. Notice mailed

1-19-81 Order impounding all moving papers re hearing compelling testimony before Judge Sarokin on January 14, 1981, filed. (Sarokin) * * *

1-26-81 Certified copy of order of U.S.C.A. granting motion of Isadore Speigel to stay execution of contempt order dated 1-9-81 pending appeal, etc., filed 1-22-81.

1-28-81 Hearing on application of Milton Reed to quash grand jury subpoena. DECISION RESERVED. (Sarokin) (1-26-81)

1-29-81 Notice of Motion of grand jury witness Robert DiConsiglio to quash grand jury subpoena returnable February 3, 1981, acknowledgement of service, filed 1-28-81. (No Brief)

1-29-81 Notice of Motion of grand jury witness Robert Turk to quash grand jury subpoena returnable February 3, 1981, proof of service, filed 1-28-81. (Brief submitted)

1-29-81 Certification of Barry H. Evenchick in support of Motion to Quash of Robert Turk, filed 1-28-81.

2-2-81 Order for inspection of records under seal filed 1-30-81. (Stern) * * *

2-3-81 Affidavit of Irving Rosen re inspection of records filed.

2-4-81 Ordered minutes and court reporters stenographic notes sealed. (Sarokin) (2-3-81)

2-5-81 Motion on behalf of Isadore Spiegel for return of monies paid pursuant to order of contempt, proof of service, filed 2-4-81. (No Brief)

2-5-81 Opinion filed 2-4-81. (Sarokin) (Granting in part and denying in part motion of Mr. Milton Reid to quash five grand jury subpoenas)

2-19-81 Order granting in part and denying in part motion of Mr. Milton Reid to quash five grand jury subpoenas, filed 2-17-81. (Sarokin)

2-19-81 Motion to compel testimony, filed 2-18-81. * * *

2-19-81 Order denying motion to quash subpoena, filed 2-18-81. (Sarokin) * * *

2-19-81 Order impounding and sealing order denying motion to quash subpoena, filed 2-18-81. (Sarokin) * * *

2-19-81 Motion for reconsideration of order of 2-17-81 granting in part; and denying in part motion of Milton Reid to quash five grand jury subpoenas and Affidavit of Service, filed 2-18-81. (Brief submitted)

2-20-81	Ordered minutes and notes of Court Reporter impounded. (Sarokin) * * * (2-18-81)
2-20-81	Ordered, filed 2-18-81. (Sarokin) * * *
2-20-81	Notice of Motion to quash subpoena ret. Feb. 20, 1931, statement in lieu of brief, proof of service, filed 2-19-81. * * *
2-23-81	Ordered minutes and notes of Court Reporter impounded. (Sarokin) (2-20-81)
2-23-81	Order denying motion to quash subpoena, filed 2-20-81. (Sarokin) * * *
2-23-81	Order impounding and sealing order denying motion to quash subpoena, filed 2-20-81. (Sarokin) * * *
2-24-81	Notification of disclosure of matters occuring before the grand jury with sealing order, filed. (Biunno) * * *
3-2-81	Hearing on motion for reconsideration of order of 2-17-81 granting in part; and denying in part motion of Milton Reid to quash five (5) grand jury subpoenas. Decision Reserved. (Sarokin) (2-27-81)
3-4-81	Order unsealing proceedings of Norman Pell, filed 3-3-81. (Fisher)
3-4-81	Verified Petition and Order impounding and sealing, filed. (Biunno)
3-9-81	Order pursuant to Rule 6(e) and sealing order filed 3-4-81. (Biunno) * *
3-12-81	Notification of disclosure of matters occurring before the grand jury and sealing order filed 3-11-81. (Biunno) * * * *
3-16-81	Certified copy of Order of U.S.C.A. affirming the judgment of the District Court, filed 3-13-81. Notice Mailed. (Appeal of Ernst Orthopedics)
3-20-81	Motion, filed 3-18-81. * * *
3-20-81	Order, filed 3-18-81. * * * (Biunno)
3-20-81	Motion, filed 3-18-81. * * *
3-20-81	Order filed 3-18-81. * * * (Biunno)
3-24-81	Notification of disclosure of matters occuring before the Grand Jury and sealing Order fled 3-23-81. (Biunno) * * *

3-26-81 Notification of disclosure of matters occuring before the Grand Jury and sealing Order filed 3-25-81. (Biunno) * * *

4-1-81 Ordered minutes and stenographic notes sealed. (Biunno) (3-30-81)

4-1-81 Affidavit, filed 3-30-81. * * *

4-8-81 Order denying motion of Milton Reid for reconsideration of motion to quash 5 Grand Jury Subpoenas, filed. (Sarokin)

4-10-81 Supplemental notification of disclosure of matters occurring before Grand Juries, with sealing order, filed 4-9-81.

4-13-81 Government's Notice of Appeal from Order of Judge Sarkokin denying motion for reconsideration filed on 4-8-81, filed 4-10-81.

4-13-81 Copies of Notice of Appeal sent to U.S.C.A., U.S. Attorney and Checki & Politan Esqs.

4-20-81 Hearing on government's motion for a grant of immunity as to witness Norman Pell. Ordered motion granted. (12-10-80) (Fisher) (Unsealed 3-4-81)

4-22-81 RECORD ON APPEAL SENT TO U.S.C.A. (NOTICE MAILED)

4-27-81 ISADORE SPEIGEL—Certified copy of USCA Order in lieu of mandate affirming judgment of the district court filed 4-23-81. (Notice mailed) (Pu USCA Order, received B1412).

4-27-81 ISADORE SPEIGEL—Certified copy of USCA Order granting motion of U.S. for issuance of Mandate (see above) filed 4-23-81.

5-13-81 Notification of disclosure of matters occuring before the grand Jury and sealing Order, filed 5-12-81. * * *

5-13-81 Notification of disclosure of matters occuring before the Grand Jury and sealing Order, filed 5-12-81. * * *

5-18-81 Notification of disclosure of matters occurring before the grand jury with sealing order filed. (Meanor) * * *

5-26-81 Ordered Catherin Ferguson and Christa Ventriglia excused from grand jury service. (Whipple) Notice mailed

5-28-81 Petition and Order for Writ of Habeas Corpus re Kenneth Carter, filed. (Meanor)

5-28-81 Writ re Kenneth Carter issued.

6-4-81 Certified copy of USCA Order granting motion of ISADORE SPEIGEL for Recall and Stay of Mandate for thirty days pending application to the Supreme Court for writ of certiorari filed. (Mandate ret'd 6-4-81)

6-5-81 Notification of Disclosure of Matters occurring before the grand jury with sealing order filed 6-4-81. (Meanor) * * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER
OF THE GRAND JURY
EMPANELLED MARCH 19, 1980

Newark, New Jersey
January 12, 1981

Before: HON. H. LEE SAROKIN, U.S.D.J.

Appearances: MICHAEL HIMMEL AND
JAMES P. ULWICK,
FOR THE GOVERNMENT.

NICHOLAS POLITAN,
For Milton Reed.

THE COURT: Mr. Ulwick, you may remain seated if that is more comfortable for you.

MR. ULWICK: Well, I will stand up, your Honor.

I think that on this particular motion, although we filed our briefs first, since we anticipated that these issues were going to be raised from discussions that we had had with Mr. Reed's attorney prior to the return date of the subpoenas, and although we did file our brief first the motion is actually Mr. Politan's since it is a motion to quash a subpoena.

Presently the factual situation is that there are four grand jury subpoenas, the return date has passed, Mr. Reed has invoked his Fifth Amendment privilege in response to the questions in the grand jury and presently we are before your Honor on Mr. Politan's motion to quash the subpoenas.

THE COURT: Let me ask you some questions because it might help us focus on the legal questions.

The brief which has been filed on behalf of Mr. Reed suggests that the corporations are really sole proprietorships.

Now, does the Government accept that representation?

MR. ULWICK: For the purpose of this motion, your Honor, there are three actually factual assertions which have been made in Mr. Reed's brief. One is that all the corporations described in the subpoenas are sole proprietorships. We will concede that for the purpose of this argument.

The second is that the possession of these records are in Mr. Reed's hands. We will concede that for the purposes of this argument.

The third is that they are able to be authenticated only by Mr. Reed. We will not concede that point.

The number of these records are bank statements, telephone toll records capable of authentication by sources other than Mr. Reed, such as employees of the bank, telephone company.

In those instances it is incorrect to say that the records are only capable of authentication by Mr. Reed. In fact it may well be that Mr. Reed can not even authenticate the particular hearsay enclosed on, for instance, the bank statements. Bank statements may say that such and such account has such and such balance. Mr. Reed might accept that, might not argue with it, but he would not be able to authenticate that.

THE COURT: Are there any other categories which you say would not be subject to his authentication alone? Bank records and telephone records, what else?

MR. ULWICK: Cancelled checks.

THE COURT: Who else could authenticate the cancelled checks?

MR. ULWICK: The checks themselves, the blank checks could be authenticated by representatives of the bank. Handwriting experts could authenticate the document as being one prepared a particular individual. There are some checks that we have—I don't know whether these particular checks will produce this particular result, but there are occasions where employees of Mr. Reed have prepared checks that were signed by them in their signatory capacity so they could be authenticated by an employee.

THE COURT: Do you also concede that the documents which you seek will or may incriminate Mr. Reed?

MR. ULWICK: Yes, your Honor.

THE COURT: Let me turn to Mr. Politan. At least we know what is conceded and what is in issue, and I will hear from you.

MR. POLITAN: Yes. If your Honor please, just as to number 1, your Honor initially referred to various companies as being corporations, there are some of these companies which are not corporations. Most of them are not, that are the subject matter of this particular application.

THE COURT: But I take it that's not an issue because the Government concedes that whether they are corporations or partnerships they will betreated for the purposes of this argument as though they were a sole proprietorship; is that correct?

MR. ULWICK: Yes.

THE COURT: So we don't have to distinguish between them.

MR. POLITAN: Because I see distinctions and differences, I see distinctions between sole proprietorships and corporations.

THE COURT: If the Government didn't take that position my next question would have been do we have to have a hearing as to each of those to determine whether they are truly a sole proprietorship, but that's now moot. It has been conceded, so you don't have to address that.

MR. POLITAN: As I view the facts basically as have been outlined by your Honor, as I read the case law, I fail to find one single solitary case that says that a man must be compelled to surrender to a grand jury documents in his possession, albeit private papers or papers in his possession which may tend to incriminate him. I have gone through the Supreme Court cases and I have gone through the Third Circuit cases. I don't see it.

I see many, many exceptions to the Boyd rule as applies to subpoeans which are served upon third parties who are forced to surrender documents of an individual notwithstanding a claim of Fifth Amendment privilege by the indi-

vidual, and the most famous of which at this point is a Callucio case where the very same papers that Judge Garth said would not be obtainable from the individual who coaimed the privilege as a sole proprietor could be obtained from his office manager, if I were to read all these cases and if I were to put one single thread which runs through them all, it is first of all a question of possession, and who has that possession.

THE COURT: That is conceded in this case.

MR. POLITAN: Once we are at that point, your Honor, I can stand here and talk for the next half hour, but I submit to your Honor that the Government can not come forth before this Court and cite one case by the Supreme Court of the United States, or one case by the Third Circuit Court of Appeals which has said that an individual can be compelled to surrender his private papers or sole proprietorship records to a grand jury.

THE COURT: I guess that one of the arguments they might make, and it has nothing to do with the application for a court order, but there is probably a practical aspect to this, and that is if you concede that at least as to the bank records and the telephone records and possibly the cancelled checks they could get those documents by subpoenaing a third person, why the fuss?

MR. POLITAN: The defendant, faced with being the target of a grand jury investigation, is not required by the Constitution or by any other rule of niceties to help his accuser gather evidence and put it in a proper form to present it to a grand jury so that an indictment can be rendered against him. That's what it is all about.

THE COURT: I can't quarrel with that. I think certainly you have to separate out the practical considerations and you'd have to advise your client based upon the law what the real legal issues are here. That's why I originally turned to Mr. Ulwick, because at least tentatively I think you are right.

So if I can switch back to Mr. Ulwick, as I understand it, Mr. Ulwick, the primary basis of Mr. Reed's argument is that if he has possession of a document which may incrimi-

nate him he is under no obligation to turn that document over, I can not compel him to turn it over.

The exceptions talk about, if possession is with someone else, or if there was a contention that they do not incriminate, which is not in this case, but the mere fact that someone else can authenticate the documents merely means what I suggested to Mr. Politan like be a practical effect, and that is if I take the position that he is right, they probably can get that documentation through other means, but that doesn't mean that he has to be practical and save you work. He may say, that's right, but that's my right and my client's right, and therefore, if you intend to obtain that information you have got to get it from some other place.

MR. ULWICK: If the particular sweeping proposition that Mr. Politan advocates were true then we would not have the case of Schwaber versus California, Wade, Dinizzo and other cases where the defendant has been compelled to provide evidence to the Government over his Fifth Amendment objection, giving blood samples, voice exemplars, handwriting exemplars, walking a certain way, talking in a certain way, things like that. There is no question under the Fifth Amendment cases as decided by the Supreme Court that a defendant or suspect or target may be compelled to do certain things which will aid the prosecution over his claims of Fifth Amendment privilege, and the reason, the distinguishing factor, is it is not considered testimonial communication. And I think that that is particularly important in this particular case.

Now, Mr. Politan has stated, and I would take issue with this, he says there are no cases that have required an individual or say that an individual is required to produce his own papers, and Mr. Politan said private papers. That's another thing I would take issue with here. We are not talking about private papers here. We are talking about business papers, papers prepared by third party.

THE COURT: What about the possession of those documents, could that incriminate Mr. Reed?

MR. ULWICK: In the Fisher Court they raised that particular issue, and they said in that particular case the ac-

knowledgment of possession did not rise to a level of Fifth Amendment violation.

I would suggest that that is exactly what we have here. Mr. Politan in most of those cases does not seriously dispute the existence of the particular documents. We have named exact accounts, in some cases with the account numbers, location of the bank, name of the bank. There is not really a dispute as to whether those documents exist.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER
OF THE GRAND JURY
EMPANNELLED MARCH 19, 1980.

NEWARK, NEW JERSEY
JAN 26, 1981

Before: HON. H. LEE SAROKIN, U.S.D.J.

Appearances: MICHAEL HIMMEL and
JAMES P. ULWICK
For the Government.

NICHOLAS POLITAN
For Milton Reed.

THE COURT: Well, if you are taking the position that the act of turn-over is not testimonial, then I assume at the trial you couldn't turn it into something that was testimonial; I think that is logically consistent.

MR. ULWICK: If I might have a moment to think about it—

THE COURT: And discuss it, please do.

MR. ULWICK: Your Honor, I think that we would certainly abide by the decision or we would agree not to, if Mr. Reed chose to appear in the grand jury and produce documents there, we would not use any testimony necessary for that production against him at a later time.

Perhaps it would be simpler if your Honor orders him to turn the documents over to the attorney so that the attorney can represent to the Court, "I am hereby turning over the documents that were ordered—"

* * * *

THE COURT: Let me ask you as a practical matter, suppose the Government exercises its right for a subpoena before the grand jury and makes a representation that they can authenticate a particular document and that the act of turn-over won't constitute authentification by the person turning it over. When the trial comes can the Government

then turn to that person and say, "Okay, didn't you have this in your possession and isn't this your signature? You turned it over to us."

What if somebody jumps up and says, "Wait a minute, you got that under—" isn't there control which follows?

MR. POLITAN: Number one, your Honor must never in the context we are now operating in, we theoretically have a grand jury who is sitting there and a grand jury theoretically is weighing whether or not to indict this particular defendant. That grand jury is going to see or hear the witness turn over the records. The grand jury becomes tainted now.

THE COURT: Whataabout the suggestion that if I were to order the turn-over you can turn it over.

MR. POLITAN: No, your Honor, for this simple reason; the compulsion comes from the subpoena. The subpoena is issued through the grand jury. It can't be done, although in other contexts it is done this way, it can't be done this way in the formal exercise of the subpoena.

We are here for your Honor to determine whether or not the subpoena is to be complied with or not complied with. The subpoena is not to the U.S. Attorney's office, but to the grand jury, who are presumably sitting unbiasedly gathering evidence and determining whether or not there should or should not be an indictment of this defendant. That means that this defendant has got to go to that grand juryroom and he has got to acknowledge, there is a subpoena returnable for the production of whatever, check books, do you have the subpoenaed check books of Milton Reed?

Yes, Mr. so and so.

And he turns it over.

There is an act of testimony before the grand jury. The grand jury is tainted already. That's just for starters, your Honor.

And then we go on from there and down the line maybe the person comes to trial, and during the course of the trial information may have been gleaned from that testimonial presentation which helped the Government prepare its case. And we don't even know, we are the defense, we don't know about an agreement and at the trial comes the

question from the Government, Mr. Reed, did you turn these over to the grand jury, or however the question comes up.

Defense counsel objects, and the Government says, oh, I am sorry, and the trial Judge is in the seventh day of trial, and I say mistrial, and the trial Judge weighs the practicalities of it and says, well, what am I going to do, waste seven days of the jury's and Court's time and everybody's time over this issue?

And yet that issue will have affected that jury in the course of the trial. That's the purpose of these Fifth Amendment rights and other rights. It is not to block the system of justice, but it is to say to the system of justice as represented by the United States Attorney, the grand jury and ultimately the court system, an individual is entitled to sit there with his mouth closed and do absolutely nothing and he is entitled to sit there and not produce any of his personal records at anytime, at any stage of the proceedings, and let the Government go its very way, and if the Government prevails and he has committed a crime or crimes and they gather their evidence and they have presented it to a grand jury, and they have gotten an indictment and they go to court and put witnesses on the stand and he is convicted, that is the American system of jurisprudence., and that's what we are talking about.

THE COURT: You don't have much quarrel with me. As I said before I read those cases I would have said that would be my view of the law, but I am obligated to follow the Third Circuit decisions and the Supreme Court decisions, and I am not so sure that they agree with your position.

Let me go back to Mr. Ulwick for a minute. Mr. Ulwick, you have to give me some help. What is the practical effect of your saying to me, turning over those documents won't constitute an admission by the target that he has possession or that he authenticates them in any way either by saying that they are mine or that they are in response to a particular demand; how does that work as a practical matter? Mr. Politan suggests that a subpoena is served upon the man, he has to come to the grand jury and produce

them. The minute he turns them over can't the grand jury say he had got them, he has possession of them, they are supposed to be cancelled checks, therefore, he is authenticating his signature on the checks; how do you accomplish this as a practical matter?

MR. ULWICK: We are presently in a position where the Court is considering a motion to quash, and out of this hearing will come an order from your Honor either denying the motion to quash and ordering it produced or granting the motion to quash.

Assuming your Honor decides to deny the motion to quash and orders Mr. Reed to produce the documents, that order can be fashioned in such a way by your Honor to prevent the kind of problems that Mr. Politan foresees.

For example, Mr. Reed could produce the documents to the agents of the grand jury, one of the special agents of the FBI—

THE COURT: Mr. Politan's argument is the grand jury has already issued the subpoena to Mr. Reed. Now, they are intelligent people. All of a sudden these books and records are going to show up.

Would the grand jury say, well, obviously there has been compliance with the subpoena and here are Mr. Reed's records, they must have been in his possession, he has authenticated them. We have given him a list and he has them and he has turned them all over.

Therefore, all of the things you say we can rule out as not being testimonial are clearly in.

MR. ULWICK: Your Honor, there are a number of distinctions I think that have to be made.

First and foremost is that the grand jury can receive all kinds of evidence. The Supreme Court has even said that it can receive hearsay, it can receive illegally seized evidence and not be subject to taint proceedings and the kind of things that Mr. Politan mentioned.

So I am not sure that there is an enforceable right by Mr. Politan in arguing that the grand jury would somehow be tainted by considering evidence which may have been obtained through compulsion.

I am arguing there may be no taint. The grand jury receives documents constantly. So I suggest that there would not be the taint problem that Mr. Politan suggests.

In terms of the practical situation considerations your Honor has raised, as I was saying before, the order for delivery by this Court can be fashioned in such a way that it doesn't necessarily have to say just, deny your motion, or grant your motion, it can be fixed by your Honor in such way that your Honor can tailor the order to the necessities of this particular case.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Misc. 80-53

IN THE MATTER OF THE
GRAND JURY ENPANELLED
MARCH 19, 1980

Newark, New Jersey
February 27, 1981

Before: H. LEE SAROKIN, U.S.D.J.

Appearances: MARYANNE DESMOND, AUSA, and
MICHAEL HIMMEL, AUSA,
For the Government.

NICHOLAS POLITAN,
Fpr Milton Reed.

THE COURT: Good morning.

MRS. DESMOND: Good morning, your Honor. Initially I would like to thank the Court for permitting us to reargue this case. We believe the issue presented, particularly the facts of this case, the decision that yor Honored rendered, is in part incorrect.

We believe it important to attempt to correct that decision for the purposes of Grand Jury administraton and because if the Court were to continue in its ruling it would stand alone in this district; therefore, I would like to—I did want to file a brief, which your Honor has accepted, setting forth the law as explicitly and as fully as I could, and I am here today to respond to your Honor's questions and to present a few additional observations.

Now, that having been said, that we are grateful for the opportunity to come back and that we appreciate the opportunity to file a comprehensive brief, I will withdraw because at the risk of guessing what your Honor would wish me to do incorrectly we will not rehash the brief. I think that all parties agree as to what the cases say. I think it would probably not benefit any of us to probably start going through it case by case, so with the Court's permission I would just make a couple of observations:

1, we are not here on any question of privilege with reference to the contents of the documents. Your Honor correctly observed that in your opinion. The issue before the Court is the act of production, whether that act of production is protected, if a witness has a right to be protected from the act of production because that act would be testimonial, incriminatory and compelled.

All three I must remind the Court are required.

We have argued in the brief that on no level does he meet the test, but I must now withdraw from the brief to make one comment.

Thus far in this matter it has been treated as if it were the Government's burden to show that there is no Fifth Amendment right. We have all been treating it that way. I think it is time to step back and look at it somewhat differently and more correctly, which is that it is the witness's burden to show why the Fifth amendment right applies, if in fact it does.

He has made utterly no showing on this ground. I cite to your Honor Hoffman versus U.S., a case which I think your Honor must take into account and which I think all parties know that the burden is in fact the witness's to come forward to make the showing.

I quote from Hoffman at page 480 and interpose the word "production" for the word "answer."

The Fifth Amendment's protection must be confined to instances where the witness has reasonable cause to apprehend danger from producton. The witness is not exonerated from producing merely becase he declares that in so doing he would incriminate himself. His say so does not in itself establish the hazard of incrimination. It is for the Court to say whether the failure to produce is justified and to require him to produce if it is not. He must make that showing.

I suggest to your Honor no showing has been made other than a say so, and through your Honor I would call on Mr. Politan now to make that showing under Hoffman.

I am fully prepared after that has been done to show why we believe that the privilege does not apply, and I am fully

prepared to do so now if your Honor does not require the showing of Mr. Politan.

THE COURT: Let me ask you this, let's put aside the question of burden for a moment and although we have been through this two or three times I don't hesitate to do it again because as I candidly conceded to counsel it is an entirely new field for me so I appreciate all of the help that I can get. Whenever this matter has been argued the Government has taken the position that the sting of turning these over is somehow eradicated by reason of the Government's ability, for instance, to otherwise prove things such as authentication, possession and existence of the documents, and when other counsel has been here for the Government I said on each occasion, I don't know, how do you implement that if there has been a subpoena issued by the Grand Jury? If there is compliance the Grand Jury certainly can infer possession, existence and authentication by the target, and I don't know, and it has never been explained to me, what is the significance then of the Government saying we can otherwise prove those things, because the Grand Jury having issued a subpoena and having the documents turned over would have a perfect right then to say, well, obviously the target possessed them, has authenticated them and has recognized and identified them; what is the significance of the Government saying, we can otherwise prove it?

MRS. DESMOND: Except this, your Honor, and I think this is something that precedes that question: if in fact the act of production does not violate his Fifth Amendment right then it doesn't matter what the Grand Jury thinks, so that the showing must be before your Honor that, A, he has possession; B, that the documents exist; C, the Government can otherwise authenticate.

If he can not make that showing then there is no Fifth Amendment privilege and it doesn't matter what the Grand Jury would think, in other words, there is no Fifth Amendment privilege to protect.

We have argued—and I think the argument becomes clearer on receipt of the reply brief which I received last evening—that in fact all—less than all of the documents

are conceded to exist explicitly. All of the documents are conceded to exist implicitly. There is a direct concession that if the documents exist he possesses them, the Government has said that as to documents the witness did not prepare they can be authenticated by other people, as to documents he did not prepare they can not be authenticated by him, and as to documents he did prepare and can authenticate we can authenticate through other witnesses.

So that there is no suggestion and no tacit concession that springs from these three branches of showing that the production would be testimonial, that would give him the right to assert Fifth Amendment protection in the first place.

THE COURT: That's why I asked—let me go back to the question I asked before, then: let's assume—and of course, it is very difficult at this stage for the Court to make a determination, for instance, whether or not authentication is a crucial element of this evidence—but let's assume for the purpose of our discussion that it is, that to authenticate these documents is crucial to the presentation to the Grand Jury, and that the act of turning over in the absence of independent evidence that the Government has would constitute an authentication by the target. Let's take that assumption.

MRS. DESMOND: In other words, we will assume for argument that there is a Fifth Amendment right to be protected?

THE COURT: Yes. The authentication, let's assume that.

Now, if we get to that point and the Government then says, well, take that element away because we can prove authentication—and I come back to the same thing I have asked, I think this is a third time, third hearing—what difference does that make? If the act of turning it over by the target is a concession of authentication what difference does it make that the Government can also prove authentication, if a Grand Jury can conclude by the target turning it over that he is authenticating it, how does a Grand Jury know that the Government can otherwise authenticate it?

How do I know that the Grand Jury will not rely on the act of turn over as the authentication?

MRS. DESMOND: Well, of course, the easy answer to that and the answer I am sure you will get quickly is the immunity that the Government has offered.

THE COURT: Nobody has offered that. I asked that question at all of the prior hearings, in other words,and I kept saying how is it implemented, and the word "immunity" was never used. In fact there was even a suggestion that the act of turn-over could be utilized at the trial of this case, for instance, if the defendant elected to take the stand.

MRS. DESMOND: That is a suggestion that I must correct, and I am prepared to do so, I would not have left this courtroom this morning without correcting that misimpression that was given. It was in answer to a question your Honor asked and it was a reasonable answer given, the Harris line of cases.

Let me just deal with that immediately as long as we are there. New Jersey—I have the cases here, Supreme Court Reports 99 Supreme Court 1292, the holding of that case is that respondent's testimony—and he was testifying under a New Jersey State grant of immunity could not constitutionally be used against him in the later criminal trial, could not be used to impeach him. Mr. Politan, if he is indicted and if he goes to trial both prereqisites, of course, for the question your Honor has posed, could under Portash take the stand and say under a grant of immunity I did not produce the documents, and we can not cross examine him on that.

Portash clearly protects him from that type of cross examination at trial. That I know was a concern of your Honor's in the opinion.

THE COURT: Let me say this, Mrs. Desmond: I think in our prior discussions with the Government that I indicated that if there was some way that I could be assured that the act of turn-over would not be utilized against a target for the reasons of authentication establishing that he had possession or that it was an acknowledgment of the identity and existence of the document, that if the Government

could assure me that that could be accomplished realistically then I would order the turn-over. And I was not satisfied after the colloquy with Government counsel that it could be accomplished. And that's why we always come back to that question, if you tell me that the Government can authenticate it otherwise, how do I know, how can I be assured that the act of turn-over will not be utilized against the target for authentication purposes? And I never had that issue resolved to my satisfaction.

If you can resolve it to my satisfaction I have no hesitancy in saying, yes, I will direct the turn-over, but only on the condition that the act of turn-over will not be utilized against the target.

And I think Mr. Politan would agree that if he had that assurance then there is no problem.

MRS. DESMOND: Let me just preface, though, what I would say as to that with this comment: there is no reason to afford immunity if there is no Fifth Amendment, valie Fifth Amendment privilege asserted. So, again, the question assumes that the witness has asserted a valid Fifth Amendment privilege. But assuming that, arguendo, the government has represented in court that it will not use the act of production against him, assuming Fifth Amendment privilege.

THE COURT: What good is that?

MRS. DESMOND: That representation, frankly, I believe was made out of an excess of caution, I believe it is because the Government did not want to go through proceedings like this, the investigation must move forward, and we are delaying it ourselves by coming back to you, but we feel the issue is important enough.

And the representation, therefore, was made that the acts would not be used against him.

I myself to the extent it has any weight at all would have not made that representation because I don't believe there is Fifth Amendment protection here. There is nothing as to which immunity should be afforded. But the representation was made.

Your Honor seems to suggest—and I don't think you mean to—that your good faith representation might be violated.

* * * *

THE COURT: What concerns me in that is the realities of life that the compliance with the subpoena and in the absence of something very definitive from me would permit the Grand Jury to do something which we say they shouldn't do, namely, to draw some conclusion from the act of turn-over.

If I were satisfied that that would be the result then I think I have indicated before I would be much more inclined to grant the—

MRS. DESMOND: I am not aware of the fact, your Honor, I think I am correct when I say that I don't think Judge Stern incorporated such a provision into the order in the Spiegel case, I don't think it is required.

THE COURT: That's clearly the legal effect of it, it is not?

MRS. DESMOND: The legal effect would be as if you had incorporated it in your order whether or not you do.

THE COURT: That's something we can talk about.

As long as you concede that's the effect of it we can decide whether it should or should not be in the order.

Thank you for the excellent briefs. As I said before, you know how I have struggled with this. I think it justifies that struggle.

Mr. Politan, I would like you to answer the question posed by Mrs. Desmond, namely, that is whether or not you have satisfied the burden that the act of turn-over would be testimonial.

MR. POLITAN: Your Honor, I would respectfully refer your Honor in the first instance to the affidavit of Assistant United States Attorney Michael Himmel which accompanied the motion before your Honor and the contents of that affidavit alone, if your Honor please, indicate the natrue of the records, the incriminatory nature of the records and the allegations made by the Government, and I would quote from paragraph 3:

"I am presently assigned to assist the Grand Jury in an investigation in the District Court of New Jersey concerning alleged violations of title 18 U.S. Code section 371, conspiracy, 1001, false statements, 1341, mail fraud, 1951, bribery and extortion, title 25 violation of the Internal Revenue laws and related offenses by Milton Reed and others arising out of the submission of bids—" and your Honor will recall that bid documents were requested—"bid bonds"—your Honor will recall they were requested—and price quotes by various companies to Hudson County and municipal entities thereof, the awarding of bids and contracts by Hudson County and municipalities thereof to said companies and the diversion of income by said companies to circumvent the Internal Revenue laws," and he goes on further.

THE COURT: May I interrupt?

All those things go to the contents of the document. We are way past that. The fact that the documents are incriminatory has nothing to do with the issue here.

The question is how will the turn-over, the act of turning the documents over, incriminate your client?

MR. POLITAN: That's the next paragraph of this affidavit which I think goes towards answering that question:

"Among other allegations the records under subpooena are relevant to the allegation that Milton Reed has maintained bank accounts in the United States, Puerto Rico and the Cayman Islands under the name of sham companies and fictitious individuals for the purpose of concealing income. Moreover, the records under subpoena would substantiate the allegation that certain companies are in fact sham companies."

That goes beyond, if your Honor please, the fact that they are incriminatory per se, vis-a-vis their content.

It also says that Milton—the allegation is that Milton Reed maintained these companies, that he has possession of these records and that they are in fact being used by him, so that he when he goes to the Grand Jury and he turns over—we have to always assume arguendo that there are records and that they are going to be turned over—when he goes to that Grand Jury and he turns over that record he

in fact is making one step in the incriminatory process, he is admitting, as your Honor said in his opinion, the existence of the document, the possession of the document, and that the document requested in the Grand Jury subpoena is in fact the document he is in fact turning over.

He has satisfied those three criteria that your Honor says go into the question of self-incrimination in the matter.

I submit to your Honor that that's the very—and there is no blunt the effect of that. I listened to Mrs. Desmond's argument this morning and she was talking about shadings, it seemed to me, shadings of incrimination and blunting this and blunting that. We can't take away from the Fifth Amendment right where we have an admitted target of a Grand Jury investigation, we can't say that we will give you some sort of representation—and I don't question at all, if your Honor please, the integrity of the United States Attorney's office—but they say we will give you a representation that these matters have—and I use Mrs. Desmond's words in her brief, and she never reaches the question of immunity per se, she says on page 22, second line:

"We will not use the act of production against Mr. Reed in any manner, the functional equivalent of use immunity," whatever that means.

We can't blunt, if you will, the violative effect of the production of the record by talking about the immunity. Mrs. Desmond said we will tell the Grand Jury that we gave him immunity over that. That's going to infect that Grand Jury process.

It is like curative instructions to a jury; there are certain acts which occur which are so devastating during the course of the trial that notwithstanding the most eloquent and best kind of erasure instructions to a jury given at the very moment the Judge is compelled to declare a mistrial because it is so damaging, it is so impactuous upon their thinking process, and there is no way, if your Honor please, that matters can be brought and given to the Grand Jury which are in Reed's possession where the effect of the possession and the turn-over can be blunted. It just can't be, if your Honor please.

THE COURT: You are suggesting that even if I incorporated the Government's suggestion into an order, namely, I am directing your client to turn over the records but under no circumstances is the turn-over of those records to be utilized for any purpose against him either before the Grand Jury or in an indictment before a trial jury, if there is an indictment, you say that can not really be effectuated?

MR. POLITAN: That's right. Plus we can't look into the minds of the Grand Jury and see what an effect it had as to whether or not it should or should not vote an indictment in a particular matter.

We have no way to police it through the Grand Jury stage.

But as your Honor say, that you can not use the production turn-over in the deliberation on whether or not an indictment should be rendered and if any element of the charge that you are going to put against the individual contains either a knowledge of possession or a possession factor that, therefore, you can't indict for that, I think, number 1, you'd be going into the Grand Jury and you wouldn't really have the true Grand Jury process anymore because a Grand Jury would not be free to consider good evidence which comes before it because it would have to worry about it and query whether or not in their subconscious had they either been instructed by a court order or an assistant U.S. Attorney or maybe we can get a procedure whereby defendant's counsel could go in there with the U.S. Attorney to make sure it is done properly, which I am sure the U.S. Attorney wouldn't want to do, we have got a mass of confusion.

THE COURT: Doesn't that risk occur every time immunity is granted?

MR. POLITAN: Not in a Grand Jury setting, not vis-a-vis the individual.

* * * *

In the Supreme Court of the United States

No. 82-786

UNITED STATES, PETITIONER,

v.

JOHN DOE

ORDER ALLOWING CERTIORARI. Filed May 2, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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CLERK

No. 82-786

In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN DOE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Government can compel an individual to produce his incriminating records before a grand jury, which production would be incriminatory, admitting ownership, existence, location and authentication of the records when the individual claims the protection of the Fifth Amendment.

2. Whether the Government can compel an individual to accept "the functional equivalent of use immunity" where they refused to advise the District Court the scope of the immunity, the procedures to be utilized and failed to obtain an order granting immunity pursuant to 18 U.S.C. §6001, *et seq.*, to override the individual's Fifth Amendment rights.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case and Facts 2

Reasons for Denying the Petition 6

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Andresen v. Maryland, 427 U.S. 463 (1976) 8

Ballmann v. Fagin, 200 U.S. 186 (1906) 6

Bellis v. United States, 417 U.S. 85 (1974) 6, 9, 10

Boyd v. United States, 116 U.S. 616 (1886).....6, 8

Fisher v. United States, 425 U.S. 391 (1976) .....passim

Contents

Page

In re Grand Jury Proceedings, (Martinez), 626 F. 2d 1051 (1st Cir. 1980) 7

Kastigar v. United States, 406 U.S. 441 (1978) 13

United States v. Beattie, 541 F. 2d 329 (2d Cir. 1976) 7

United States v. Davis, 636 F. 2d 1028 (5th Cir. 1981) 8

United States v. Doe, 625 F. 2d 694 (1st Cir. 1980) 7

United States v. Helina, 549 F. 2d 713 (9th Cir. 1977) 8

United States v. Kent Oil & Gas Company, 646 F. 2d 963 (5th Cir. 1981)..... 8

United States v. MacKey, 647 F. 2d 898 (9th Cir. 1981) 8

United States v. Penrod, 609 F. 2d 1092 (4th Cir. 1979) 7

United States v. Pleasons, 560 F. 2d 890 (8th Cir. 1977) 8

Statutes Cited:

18 U.S.C. §6001, *et seq* i

Contents

Page

18 U.S.C. §§6002-6003 13

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fifth Amendment ..... passim

Other Authority Cited:

L. Levy, Origins of the Fifth Amendment, 390 (1968) 7

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UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN DOE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent submits this brief in opposition to the Government's petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 680 F. 2d 327 (Pet. App. 1a-21a). The opinion of the District Court is unreported (Pet. App. 23a-27a).

JURISDICTION

The Government invokes the jurisdiction of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

STATEMENT OF THE CASE AND FACTS

In November and December, 1980, five separate grand jury subpoenaes were served on respondent, the target of a grand jury investigation. These subpoenaes commanded respondent in his personal capacity to appear before a grand jury and produce various documents and records all relating to respondent personally and to his sole proprietorships.

On November 19, 1980, the grand jury issued two subpoenaes to respondent requiring production of (1) the telephone toll records of several companies of which he is sole proprietor, and (2) "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four accounts held by respondent or his proprietorships (Pet. App. 28a-31a).

On November 25, 1980, the grand jury issued a subpoena to respondent calling for production of "any and all records as per the attached Schedule A for (a named proprietorship) for the period January 1, 1976 to present." Schedule A lists twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices, payroll records, contracts and copies

of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee workpapers (Pet. App. 32a-33a). A fourth subpoena was issued on December 19, 1980, seeking access to a laundry list of documents relating to another proprietorship (Pet. App. 34a).

Finally, on December 29, 1980, the grand jury directed respondent to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of his proprietorships maintained at certain banks (Pet. App. 36a).

In early January, 1981, respondent moved to quash the above subpoenaes on the grounds that the compelled production of the records would violate his rights against self-incrimination under the Fifth Amendment. The Government conceded at oral argument on the motion that the records sought relate to sole proprietorships of respondent, that they are in his possession and that the records will or may incriminate respondent (C.A. App. 27a-29a).

By opinion of February 4, 1981, the District Court granted substantially all the relief sought by respondent, excepting only records required to be kept by law produced (Pet. App. 23a-27a). In quashing the subpoenaes, the District Court held the act of producing the records to have communicative aspects which warrant Fifth Amendment protection.

On February 19, 1981, the Government moved for reconsideration and after briefs and oral argument and by order of April 8, 1981, said motion was denied (C.A. App. 135a).

The Court of Appeals affirmed holding the "enforcement of these subpoenaes would result in a compelled testimonial

communication, an outcome neither compatible with the fifth amendment nor consonant with *Fisher*"* (Pet. App. 17a).

First the court rejected the Government's argument that it must consider the size of the organization the records are subpoenaed from and if of sufficient size find a separate entity and apply those cases dealing with documents held by representatives of a collective group. The court stated:

> In *Bellis, supra,* the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the *size* of the organization the records of which were being subpoenaed, but rather the *nature* of the capacity — either personal or representational — with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations which have 'a recognizable juridical existence apart from [their] members,' " such as corporations or partnerships, and "those which do not," such as sole proprietorships (citations omitted). While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:
>
> > It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled

* *Fisher v. United States,* 425 U.S. 391 (1976).

> production of his personal papers and effects as well as compelled oral testimony. . . . *The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added)

(Pet. App. 6a, 7a).

The court next applied the rule of *Fisher* finding its three requirements present here. It found production by respondent of the subpoenaed records would result in (1) compulsion of a (2) testimonial communication that is (3) incriminating. Since compulsion was supplied by the subpoena and incrimination was stipulated by the Government, the discussion was concerned with the testimonial communication required by production. The court recognized the two situations found in *Fisher* where production in response to a subpoena has communicative aspects, *i.e.*, (1) an admission of existence of the records and their possession and control by the target and (2) the authentication of the records of the target. As to the first, the court stated:

> In the matter *sub judice,* however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist — or that the appellee

> even is somehow connected to the business entities under investigation — is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary information against himself.

(Footnote omitted, citation omitted.) (Pet. App. 15a, 16a).

As to the second situation, the court noted that since the subpoenaed documents were most likely prepared by respondent they could not be authenticated without respondent's participation. Therefore, responding to the subpoenaes would represent a substantial threat of self-incrimination protectable in this case by the Fifth Amendment.

The court next rejected the Government's argument that respondent's Fifth Amendment claim was a "blanket claim" and not specific (Pet. App. 18a, 19a). The court found even if a "blanket claim" was originally posited it was not upheld by the District Ccourt when it ordered production of all records required to be kept by law.

Finally, the court declined to reach the question of whether an award of use immunity by the Government overrides respondent's Fifth Amendment claim since no offer of immunity was ever solidified or immunity granted (Pet. App. 19a, 20a).

REASONS FOR DENYING THE PETITION

This matter presents a routine application of long standing precedent that an individual cannot be compelled to produce testimony or records and documents in his possession or control which incriminate him. *Boyd v. United States,* 116 U.S. 616 (1886); *Ballmann v. Fagin,* 200 U.S. 186 (1906); *Bellis v. United States,* 417 U.S. 85 (1974); *Fisher v. United States,* 425 U.S. 391 (1976).

See L. Levy, *Origins of the Fifth Amendment,* 390 (1968). Despite the Government's contention, no confusion exists regarding the applicability of the Fifth Amendment to records of the nature sought here and no court has compelled production of similar type records in the face of a Fifth Amendment claim. The question here was not addressed in *Fisher* since there the records sought were not the taxpayer's records but his accountants.

1. (A) All courts of appeals considering the issue, in light of *Fisher,* of whether compelled production by a sole proprietor of his incriminating documents have concluded the Fifth Amendment bars such production. In *In Re Grand Jury Proceedings (Martinez),* 626 F. 2d 1051 (1st Cir. 1980), the court recognized that the compelled production by a doctor of his appointment logs prepared by himself and others under his supervision which are incriminating would produce incriminating authentication testimony and thus be violative of the Fifth Amendment. There, the court remanded the matter to the District Court with instructions to quash the subpoena unless the Government informed the court it granted the taxpayer immunity. 626 F. 2d at 1058. *See also, United States v. Doe,* 628 F. 2d 694 (1st Cir. 1980).

In *United States v. Beattie,* 541 F. 2d 329 (2d Cir. 1976), the Second Circuit refused enforcement of an Internal Revenue Service summons seeking a taxpayer to produce letters he had written to his accountant.

In the Fourth Circuit in *United States v. Penrod,* 609 F. 2d 1092 (4th Cir. 1979), a grand jury subpoena was complied with by a sole proprietor who later at trial contended that introduction of the subpoenaed documents into evidence violated his Fifth Amendment right against self-incrimination. Although the court found a waiver by compliance, it noted that the defendant could have declined to comply based on Fifth Amendment grounds.

In the Fifth Circuit in *United States v. Kent Oil & Gas Company,* 646 F. 2d 963 (5th Cir. 1981), the court affirmed a District Court order quashing a grand jury subpoena to a sole proprietor for his business records on Fifth Amendment grounds *See also, United States v. Davis,* 636 F. 2d 1028 (5th Cir. 1981) ("Any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process regardless of whether they are business-related or more inherently personal in content.") (footnotes omitted) 636 F. 2d at 1043.

In *United States v. Pleasons,* 560 F. 2d 890 (8th Cir. 1977), the defendant, a doctor, sought to suppress his medical records and appointment books surrendered by himself to a grand jury claiming their introduction violated his Fifth Amendment right to self-incrimination. The court affirmed a denial of the suppression motion but stated the doctor could have availed himself of his Fifth Amendment right when served with the subpoena. The court stated "[w]e know thereof no reason why the Fifth Amendment's protection would not have extended to Mr. Pleasons and his private medical papers had he chosen to refuse to produce them." 560 F. 2d at 893.

In the Ninth Circuit in *United States v. Helina,* 549 F. 2d 713 (9th Cir. 1977), the Government's comment in summation on the refusal of the taxpayer to turn over his records to the Internal Revenue Service was an issue. The court, in discussing the comment, found neither *Fisher* nor *Andresen* limited the Fifth Amendment privilege of an individual not to produce incriminating records and disapproved the comment. *See also, United States v. MacKey,* 647 F. 2d 898 (9th Cir. 1981).

Thus, there is no division on the issues in the Courts of Appeals and all Circuits follow *Fisher* and protect a sole proprietor from compelled production of incriminating records and documents.

(B) The distinction drawn below between protection afforded to the records of corporations and partnerships and that afforded to sole proprietors is of long standing historical and legal precedent and is based on the protections afforded an individual as opposed to an artificial entity or a collective group. Records and documents of a sole proprietor are personal in nature since they are merely an extension of the individual. In *Bellis v. United States, supra,* the Court discussed the different treatment afforded individuals and collective groups. The Court stated, in discussing the protection afforded an individual

> As the Court explained in *United States v. White, supra* at 698 "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." (citations omitted)

417 U.S. at 88.

* * *

> These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own

> testimony on personal records." *United States* v. *White, supra,* at 701.

417 U.S. at 89-90.

Insofar as the treatment of representatives of collective groups, the Court stated:

> Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege.

417 U.S. at 90.

Moreover, the size of the proprietorship has no bearing on the proprietor's Fifth Amendment right for no matter how large or small the records are still the individual's and not the organization's since the proprietorship has no identity apart from the individual. Any concern with law enforcement effects of this principle are dissipated by the court here.

> Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials. For example, many of the records sought from the appellee in this case no doubt could be obtained by the Government from other sources. Similarly, the appellee would have no right to invoke the fifth amendment if the documents involved were not in his actual or constructive possession. *Couch* v. *United States,* 409 U.S. 322 (1973). Nor could he complain if the documents had been prepared by or obtained from a third party, *Fisher,* or if they

> were seized from his office by investigators bearing valid warrants. *Andresen* v. *Maryland*, 427 U.S. 463 (1976). In this case, however, the Government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely this sort of expedition that the fifth amendment traditionally has been interpreted to prevent.

(Footnote omitted, Pet. App. 17a).

Thus, the size of the proprietorship is irrelevant and no authority exists for treating a sole proprietor as a representative of a collective group.

(C) No anomaly exists between the protection afforded seizure of personal records pursuant to a search warrant and when sought by subpoena or summons. The difference in treatment is grounded on the compulsory authentication on the individual when served with a subpoena. No such compulsion or cooperation is present when documents are seized. In addition to compulsion there are other valid reasons for the distinction in treatment. A subpoena does not require a finding of probable cause by a neutral judicial officer while a search warrant does, thus affording greater protection to the individual. In addition, an individual can deny knowledge of the existence of documents seized during a search, which is hardly feasible when the individual is compelled to produce and authenticate documents. The distinctions that exist are grounded in solid principles which are fundamental in purpose.

(D) Authorship and ownership of the subpoenaed documents were not held to be determinative factors of an individual's Fifth Amendment claim to production of documents in *Fisher*. Rather, the discussion of these factors in *Fisher* related not to a sole proprietor but to an agent holding documents of another, as in

Fisher, the taxpayer holding the accountant's records. There it was clear the taxpayer was neither the author nor owner of the subpoenaed documents while here the court found the documents were "most likely" prepared by respondent and "in all likelihood contain (possibly incriminating) declarations by him." (Pet. App. 15a, 16a).

(E) The Third Circuit correctly applied *Fisher* finding here the act of production of the documents subpoenaed would amount to an incriminating testimonial communication. In *Fisher*, the Court stated:

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayer's belief that the papers are those described in the subpoena." (Citations omitted). 425 U.S. at 410.

The Court in *Fisher* went on to stress that the accountant's workpapers in the taxpayer's possession did not belong to the taxpayer, were not prepared by him and did not contain his testimonial declaration. The language the Government seizes upon from *Fisher* to bolster their argument that production here does not rise to a testimonial communication is language the Court in *Fisher* used to demonstrate why the privilege was inapplicable there. The significant aspect of *Fisher* is that it recognizes admissions of authentication, possession and existence can all be testimonial communications. Here, the court properly distinguished the language in *Fisher* relied on by the Government. Possession and existence are not conceded here as in *Fisher* and here the production automatically authenticates the documents

as the respondent's. Perhaps other methods of authentication are available to the Government as it suggests but the harm will have already been done in compelling authentication before the grand jury.

2. The problem with the Government's offer of immunity in the District Court is that they to this day refuse to state what is being immunized to assure the Court that the immunity is co-extensive with the privilege. *Kastigar v. United States,* 406 U.S. 441 (1978). If the Government was serious they could have invoked the statutory provisions, 18 U.S.C. §§6002 or 6003, and obtained an order granting immunity. This they did not do. The Third Circuit believed the issue premature and declined to reach the issue whether an award of use immunity in this situation is constitutionally permissible (Pet. App. 19a, 20a). Since the issue was not reached below, it should not be considered here.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases:

Boyd v. *United States*, 116 U.S. 616 5

Fisher v. *United States*, 425 U.S. 391 ..... 1, 2, 3, 5

Grand Jury Proceedings (Martinez), In re, 626 F.2d 1050 ..... 3, 4

Grand Jury Subpoena Duces Tecum, In re, No. 82-2093 (Jan. 5, 1983) 6

United States v. *Abrams*, 615 F.2d 541 3

United States v. *Beattie*, 541 F.2d 329 2

United States v. *Doe*, 628 F.2d 694 ..... 3, 4

United States v. *Helina*, 549 F.2d 713 ..... 2, 3

United States v. *Mackey*, 647 F.2d 898 3

United States v. *Penrod*, 609 F.2d 1092 2

United States v. *Plesons*, 560 F.2d 890 2

Constitution and statute:

United States Constitution, Fifth Amendment 1, 2, 3, 6, 7

18 U.S.C. 6001-6003 6

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No. 82-786

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent's Brief in Opposition illustrates the confusion in which the important Fifth Amendment questions presented by this case is mired. Respondent's principal contention (Br. in Opp. 6; emphasis added) is that the decision below was "a routine application of long standing precedent that *an individual cannot be compelled to produce * * * records and documents in his possession or control which incriminate him.*" However, the "precedent" upon which respondent relies is squarely contrary to the holding in *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court's most recent and important decision in this area. In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (*id.* at 394). This Court held that the attorneys could not resist an IRS summons for those papers on grounds of attorney-client privilege because the Fifth Amendment would not have

prevented disclosure of the documents if they had remained in the taxpayers' possession. Assuming that the "papers on their face might incriminate the taxpayer" (*id.* at 409), the Court nevertheless held that the taxpayers could have been required to produce them (*id.* at 414). In short, *Fisher* was a case in which, contrary to the rule invoked by respondent, individuals were held to be required to produce incriminating records and documents in their possession.

2. Respondent misleadingly states (Br. in Opp. 7) that the courts of appeals have unanimously concluded that the Fifth Amendment bars "compelled production by a sole proprietor of his incriminating documents."[1] On the

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[1]We disagree with respondent's suggestion (Br. in Opp. 7-8) that the Second, Fourth, and Ninth Circuits, like the Third and Fifth (see Pet. 9-10), have concluded that the contents of a sole proprietorship's standard business records are protected by the Fifth Amendment. The documents in *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976) (a taxpayer's letters to his accountant), and *United States* v. *Plesons*, 560 F.2d 890 (8th Cir. 1977) (a doctor's "private medical papers") were more akin to purely personal papers, such as personal diaries and correspondence, than to the standard business records, such as ledgers, vouchers, and bank statements, involved in this case (see Pet. App. 3a n.2). See also Pet. App. 11a-12a (interpreting *Beattie* as applying to "private papers").

In *United States* v. *Penrod*, 609 F.2d 1092, 1095 (4th Cir. 1979), the court merely "assume[d] without deciding" that the defendant could have declined to comply with a subpoena for his sole proprietorship's invoices. The court then held (*ibid.*) that by complying with the subpoena the defendant had waived "any Fifth Amendment right he may have possessed."

In *United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977), the court held that remarks made by the prosecutor during a trial for tax offenses did not constitute comment upon the defendant's refusal on Fifth Amendment grounds to produce personal books and records relating to his taxes. Not only were the papers in question not standard business records, but the government did not even challenge the taxpaper's "invocation of his Fifth Amendment rights" (549 F.2d at 716), and the court's suggestion that the taxpayer was entitled to resist production

contrary, however, as noted in our petition (at 10), the First Circuit has concluded that " '[t]he line of cases culminating in *Fisher* have [sic] stripped the content of business records of any Fifth Amendment protection; such protection is afforded only to the testimonial content of the act of turning over the records under compulsion.' " quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980). See also *United States* v. *Doe*, 628 F.2d 694, 696 (1st Cir. 1980). Cf. *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980). Indeed, *Martinez* and *Doe* are directly parallel to the present case, and the decisions in those cases conflict with that below. In *Martinez*, the court vacated an order quashing a subpoena for documents prepared by a physician. Concluding under the circumstances that "compliance with the subpoena would produce incriminating authentication evidence" (626 F.2d at 1055), the court remanded the case so that the government could grant the physician "use immunity as to the testimony implicit in the [act of production]" (*id.* at 1058). Similarly, in *Doe*, the court vacated an order quashing the portion of a subpoena seeking records prepared and possessed by an accountant. As in *Martinez*, the court remanded so that act of production immunity could be extended. Here, by contrast, the

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may have been based upon problems arising from the act of production (see *id.* at 716 n.3), rather then any supposed privilege respecting the contents of the documents.

In *United States* v. *MacKey*, 647 F.2d 898 (9th Cir. 1981), the court held that a corporate officer's diary, calenders, and appointment books, which contained both business and personal notations, were corporate documents and thus not privileged. That decision illustrates the anomalous distinction now drawn by many courts between corporate and partnership records, on the one hand, and sole proprietorship records, on the other. It is difficult to see why the diaries, calendars, and appointment books of a corporate officer or a partnership employee should have less protection from compelled production for use against that individual than identical documents possessed by a sole proprietor.

government offered respondent the fuctional equivalent of act of production immunity, but the court of appeals affirmed the quashing of the subpoena. The decisions of the courts of appeals are thus in conflict.[2]

3. The court below drew a distinction (Pet. App. 5a-8a) between the scope of the protection afforded the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other, but the court itself described that distinction as "irrational" (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez), supra,* 626 F.2d at 1056) and stated that treating all preexisting business records the same way had "considerable analytic appeal" (Pet. App. 6a). Respondent seeks to defend (Br. in Opp. 9) that "irrational" distinction on the ground that it reflects the different "protections afforded an individual as opposed to an artificial entity or a collective group." However, respondent's argument is untenable because the corporate officer or partner who may be compelled to produce documents that incriminate *him* is not "an artificial entity or a collective group." It is surely anomalous that one doctor, lawyer, or businessman may be required to produce incriminating documents in his possession simply because he has

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[2]To be sure, in the present case the government did not make a formal request for statutory immunity, as prescribed by the First Circuit (see *Martinez, supra,* 626 F.2d at 1058). The government's reasons for not doing so are explained in the petition (see Pet. 18-19) and page 6, *infra.* In any event, even if such a request was required, *Martinez* and *Doe* make it clear that in a case such as this, the First Circuit at the least, would have vacated the order quashing the subpoenas and remanded so that the appropriate form of immunity could be extended. Not only did the Third Circuit refuse the government's request for such a remand, but the court's holding that the *contents* of a sole proprietorship's business records are privileged (see Pet. App. 14a) made it clear that no form of act of production immunity would have sufficed.

incorporated, whereas another doctor, lawyer, or businessman may properly refuse to produce identical documents because he practices or does business as a sole proprietorship. Abstract distinctions based upon the fact that corporations and partnerships are "artificial" entities or "collective" groups do not adequately explain such strikingly dissimilar results.

4. Respondent contends (Br. in Opp. 12) that the court of appeals correctly concluded that the act of producing the subpoenaed documents would have been incriminating. Respondent distinguishes *Fisher*, in which this Court reached the opposite conclusion, because in *Fisher* the papers "did not belong to the taxpayer, were not prepared by him and did not contain his testimonial declaration" (*ibid.*). As explained in our petition (at 14-15), however, none of these distinctions comports with the broad principle upon which *Fisher* was based. In addition, these distinctions do not satisfactorily explain the decision in this case (see Pet. 14-15). More important, distinguishing *Fisher* on these grounds, as the court of appeals did (Pet. App. 14a-17a), limits *Fisher* to the unusual situation presented in that case, where the papers at issue were not written, prepared, or owned by the person from whom they were sought. That situation will naturally arise infrequently and can be easily avoided simply by transferring title to the documents. Under the decision below, however, the discredited rule of *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), would continue to apply in all other situations. If *Fisher* is to be limited in this fashion, this Court and not the lower federal courts should do so.

5. Finally, respondent argues (Br. in Opp. 13) that "[t]he problem with the Government's offer of immunity in the District Court is that they to this day refuse to state what is being immunized." However, the government unambiguously stated that immunity should be granted " 'with

respect to the act of production' " (Pet App. 19a; citation omitted).

Respondent maintains (Br. in Opp. 13) that the government should have made a formal request for statutory immunity under 18 U.S.C. 6001-6003. This argument, which echoes that of the court of appeals (Pet. App. 19a-20a), is disingenuous. As we expalined in our petition (Pet. 18 n.9), "[t]he government did not make a formal request * * * because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all documents listed in the subpoenas rather than showing that the act of producing particular documents or categories of documents would amount to testimonial self-incrimination." Because respondent's Fifth Amendment claim was overbroad, the government was given the Hobson's choice of requesting that respondent be granted immunity to which he was not entitled under the Fifth Amendment or of getting no immunity grant whatsoever.[3]

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[3]We also wish to call the Court's attention to the recent decision of the Tenth Circuit in *In re Grand Jury Subpoena Duces Tecum*, No. 82-2093 (Jan. 5, 1983), which conflicts with the holding below that a person who resists compliance with a subpoena on Fifth Amendment grounds may rest upon a blanket assertion of the privilege (see Pet. App. 18a-19a). In the present case, respondent asserted the Fifth Amendment privilege as to all documents sought, including those that he did not prepare (see *id.* at 16a) and common categories of business records (see *id.* at 3a n.2), the possession of which would not appear to be incriminating. Without requiring that respondent explain why the act of producing each category of documents constituted testimonial self-incrimination, the court concluded (*id.* at 19a) that respondent "did not improperly assert his fifth amendment rights."

The Tenth Circuit, by contrast, held (*In re Grand Jury Subpoena Duces Tecum, supra*, slip op. 3-5) that taxpayers served with a subpoena for their tax returns, related work papers, financial statements, and correspondence could not properly invoke the Fifth Amendment privilege without explaining why it applied to each document at issue. The

In conclusion, we think it beyond serious dispute that the issue we present is one of the most significant unsettled questions concerning the proper interpretation of the Fifth Amendment privilege against compelled self-incrimination. The issue is of manifest practical importance, and this is, we submit, an appropriate vehicle for the Court to resolve it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JANUARY 1983

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court noted (slip op. 4) that "the record did not identify which documents were in fact authored by the [taxpayers]" — a fact apparently not found relevant by the court of appeals in the present case (see Pet. App. 16a).

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BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compelled self-incrimination may be properly invoked by a sole proprietor in response to a subpoena for preexisting business records, many of which were not prepared by him and are of a type kept by virtually all businesses.

2. Whether a person may properly resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the availability of use immunity with respect to the act of production.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	1
Statement	2
Summary of argument	6
Argument:	
The Fifth Amendment privilege against self-incrimination may not properly be invoked by a sole proprietor in response to a subpoena for pre-existing business records	11
I. The contents of a sole proprietorship's preexisting business records are not privileged under the Fifth Amendment	12
II. Any testimonial self-incrimination inherent in the act of producing standard categories of business records held by a sole proprietorship is cured by prohibiting the introduction in subsequent proceedings of proof of the act of production	30
A. The act of producing standard categories of business records held by a sole proprietorship generally does not constitute testimonial self-incrimination	31
B. When a documentary subpoena is resisted on the ground that the act of production would constitute testimonial self-incrimination, Fifth Amendment rights are fully protected and interference with grand jury investigations is minimized by requiring production but excluding evidence of the act of production in future proceedings	43
Conclusion	49

TABLE OF AUTHORITIES

Cases:	Page
Abel v. *United States*, 362 U.S. 217	19
Andresen v. *Maryland*, 427 U.S. 463	7, 12, 15, 17, 26, 27, 28, 29, 35
Bellis v. *United States*, U.S. 85	17, 22, 23, 24, 25
Boyd v. *United States*, 116 U.S. 616	5, 7, 15, 16, 17, 19
Branzburg v. *Hayes*, 408 U.S. 665	37
Clifford, In re, 566 F.2d 1023	34
Costello v. *United States*, 350 U.S. 359	33, 45
Entick v. *Carrington*, 19 How. St. Tr. 1029 [C.P. 1765]	16, 19
Essegee Co. v. *United States*, 262 U.S. 151	22
Fisher v. *United States*, 425 U.S. 391	*passim*
Fred R. Witte Center Glass No. 3, In re, 544 F.2d 1026	21
Gilbert v. *California*, 388 U.S. 263	13
Gouled v. *United States*, 255 U.S. 298	19
Grand Jury Empanelled (Markowitz), In re, 603 F.2d 469	15, 38, 39, 47
Grand Jury Empanelled (Colucci), In re, 597 F.2d 851	15
Grand Jury Investigation ("A"), In re, 587 F.2d 589	47
Grand Jury Matter, In re, 673 F.2d 688, cert. denied, No. 82-123 (Nov. 15, 1982)	48
Grand Jury Proceedings (Martinez), In re, 626 F.2d 1051	4, 15, 18, 23, 27, 28, 32, 38, 46, 48
Grand Jury Subpoena Duces Tecum, In re, 697 F.2d 277	38, 39
Grant v. *United States*, 227 U.S. 74	24
Hale v. *Henkel*, 201 U.S. 43	22
Hoffman v. *United States*, 341 U.S. 479	32, 38, 39
Holt v. *United States*, 218 U.S. 245	13
ICC v. *Gould*, 629 F.2d 847	28
Kastigar v. *United States*, 406 U.S. 441	14, 17
Katz, In re, 623 F.2d 122	39
Katz v. *United States*, 389 U.S. 347	17
Manness v. *Meyer*, 419 U.S. 449	44
Marchetti v. *United States*, 390 U.S. 39	32, 38

Cases—Continued: Page

Marron v. *United States*, 275 U.S. 192 19
Mason v. *United States*, 214 U.S. 362 32
McGuire v. *Davis*, 437 F.2d 570 34
Michigan v. *Tucker*, 417 U.S. 433 ..... 7, 12
Miranda v. *Arizona*, 384 U.S. 436 12
Olmstead v. *United States*, 277 U.S. 438 12
National City Trading Corp. v. *United States*, 635 F.2d 1020 27
Peter Eckrich & Sons, Inc. v. *Selected Meat Co.*, 512 F.2d 1158 35
Pillsbury v. *Conboy*, No. 81-825 (Jan. 11, 1983) 38
Rhodes v. *Va.-Fla. Corp.*, 476 F.2d 82 36
Rogers v. *United States*, 340 U.S. 367 ..... 22, 32
Schmerber v. *California*, 384 U.S. 757 13
Shapiro v. *United States*, 335 U.S. 1 3
Simmons v. *United States*, 390 U.S. 377 48
United States v. *Abrams*, 615 F.2d 541 28
United States v. *Apfelbaum*, 445 U.S. 115 ..... 46, 47
United States v. *Authment*, 607 F.2d 1129 32
United States v. *Blue*, 384 U.S. 251 45
United States v. *Bray*, 546 F.2d 851 ..... 15, 18
United States v. *Calandra*, 414 U.S. 338 ..... 18, 33, 38, 45
United States v. *Colyer*, 571 F.2d 941, cert. denied, 439 U.S. 933 35
United States v. *Davis*, 636 F.2d 1028, cert. denied, 454 U.S. 862 ..... 20, 26, 27, 28, 32
United States v. *Doe*, 628 F.2d 694 ..... 15, 28, 31, 46
United States v. *Drape*, 668 F.2d 22 48
United States v. *Dreitzler*, 577 F.2d 539, cert. denied, 440 U.S. 927 35
United States v. *Evans*, 572 F.2d 455 34-35
United States v. *Fox*, 549 F.Supp. 1362 39
United States v. *Gipson*, 609 F.2d 893 34
United States v. *Goichman*, 547 F.2d 778 35
United States v. *Gomez-Rojas*, 507 F.2d 1213, cert. denied, 423 U.S. 226 39
United States v. *Goodwin*, 625 F.2d 693 39
United States v. *Gordon*, 634 F.2d 639 35
United States v. *Hankins*, 565 F.2d 1344, cert. denied, 440 U.S. 909 25

Cases—Continued: Page

United States v. *Helberg*, 565 F.2d 993 34
United States v. *Helina*, 549 F.2d 713 28
United States v. *Hodgson*, 492 F.2d 1175 39
United States v. *Horton*, 629 F.2d 577 39
United States v. *Hunter*, 672 F.2d 815 48
United States v. *Inmon*, 568 F.2d 326 47
United States v. *Johnson*, 637 F.2d 1224 36
United States v. *Kilgore*, 518 F.2d 496, cert. denied, 425 U.S. 950 and 430 U.S. 905 35
United States v. *Lefkowitz*, 285 U.S. 452 19
United States v. *Luschen*, 614 F.2d 1164, cert. denied, 446 U.S. 939 35
United States v. *Melchor-Moreno*, 536 F.2d 1042.. 38, 39
United States v. *Miller*, 425 U.S. 435 17
United States v. *Miller*, 660 F.2d 563 20
United States v. *Namer*, 680 F.2d 1088 .....15, 18, 27, 28
United States v. *Nobles*, 422 U.S. 225 28
United States v. *One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040 36
United States v. *Osborn*, 561 F.2d 1334 ..... 15, 32
United States v. *Page*, 544 F.2d 982 35
United States v. *Porter*, No. 83-1278 (7th Cir. July 6, 1983) 45, 46
United States v. *Praetorius*, 622 F.2d 1054, cert. denied, 449 U.S. 860 32
United States v. *Radetsky*, 535 F.2d 556 23
United States v. *Reese*, 568 F.2d 1246 35
United States v. *Reynolds*, 345 U.S. 1 38
United States v. *Rodriguez*, 706 F.2d 31 39
United States v. *Schlansky*, No. 82-5200 (6th Cir. June 16, 1983) 15, 43, 44
United States v. *Smith*, 609 F.2d 1294 34
United States v. *Thevis*, 665 F.2d 616, cert. denied, 456 U.S. 1008 48
United States v. *Ullrich*, 580 F.2d 765 34
United States v. *Wade*, 388 U.S. 218 13
United States v. *White*, 322 U.S. 694 ..... 22, 25
Warden v. *Hayden*, 387 U.S. 294 ..... 8, 17
Weeks v. *United States*, 323 U.S. 383 17
Wheeler v. *United States*, 226 U.S. 478 25
Wild v. *Brewer*, 329 F.2d 924 23

Constitution, statutes, and rules—Continued Page

Wilson v. *United States*, 221 U.S. 361 22
Witness Before the Grand Jury, In re, 546 F.2d 825 26
Zurcher v. *Stanford Daily*, 436 U.S. 547 27

Constitution, statutes, and rules:

U.S. Const.:
Amend. IV 16, 17, 18, 20, 30
Amend. V ..... *passim*
18 U.S.C. 6002 46
18 U.S.C. 6003 46
Fed. R. Evid.:
Rule 101 33
Rule 801 37
Rule 802 37
Rule 803(6) 37
Rule 901(a) 34
Rule 901(b) advisory committee note 35
Rule 901(b)(3) 35
Rule 901(b)(4) 35, 36
Rule 1101(a)(2) 33

Miscellaneous:

Brown, *Authentication and Contents of Writings (Law and the Social Order)*, 1969 Ariz. St. L. J. 611 33
E. Cleary, *McCormick on Evidence* (2d ed. 1972) .. 13, 33, 34, 35
Erich, *Unnecessary Difficulties of Proof*, 32 Yale L.J. 436 (1923) 33
Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671 (1968) 29
Levin, *Authentication and Content of Writings*, 10 Rutgers L. Rev. 632 (1955-1956) 33
Strong, *Liberalizing the Authentication of Private Writings*, 52 Cornell L. Rev. 284 (1964) .....

Miscellaneous—Continued Page

D. Louisell & C. Mueller *Federal Evidence* (1980):
Vol. 4 35
Vol. 5 ..... 33, 34, 35, 36
5 J. Weinstein & M. Berger, *Weinstein's Evidence* (1982) 34, 35, 36
J. Wigmore, *Evidence*:
Vol. 7 (Chadbourn rev. 1978) 34
Vol. 8 (McNaughton rev. 1961) 13, 25

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 680 F.2d 327. The opinion of the district court (Pet. App. 23a-27a) is reported at 541 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1982. A petition for rehearing was denied on August 10, 1982. On October 1, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 8, 1982. The petition was filed on that date and was granted on May 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. In the fall of 1980, a federal grand jury in Newark, New Jersey, was investigating corruption in the awarding of county and municipal contracts, as well as related tax violations. The investigation focused in part on the activities of respondent John Doe [1] and several companies (organized as sole proprietorships) through which he did business with units of local government.

In November and December 1980, the grand jury caused five subpoenas to be served on respondent calling for the production of numerous business records relating to his various companies (Pet. App. 28a-36a). The first two subpoenas demanded the production of the telephone toll records of several of his companies, as well as "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present," for four bank accounts held by respondent or his companies (*id.* at 28a-31a).

The third subpoena required respondent to produce "any and all records as per the attached Schedule A for [one of respondent's companies] for the period January 1, 1976 to present" (*id.* at 32a-33a). Schedule A listed 28 categories of common business records (*id.* at 33a).[2]

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[1] Because of the ongoing grand jury inquiry, the court of appeals granted the government's request not to disclose respondent's name or any details that would identify him (see Pet. App. 2a n.1). For this reason, we did not use respondent's name in our petition or the appendix thereto. Later and without prior notice to the government, the district court's opinion, which had originally been marked "not for publication" (see Pet. App. 23a), was published at 541 F.Supp. 1. This opinion identifies respondent and his companies. We have nevertheless omitted respondent's name and other identifying details from this brief.

[2] These were:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Petty cash books and vouchers.

[Continued]

The fourth subpoena demanded production of a similar list of business records belonging to another company (*id.* at 34a-35a). The final subpoena required respondent to testify and produce "all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts "at the Royal Bank of Canada, Georgetown, Grand Cayman Islands" belonging to two other companies (*id.* at 36a).

Respondent moved to quash all five subpoenas on Fifth Amendment grounds, and the district court granted his motion except with respect to those documents required to be kept by law[3] (*id.* at 22a). In its opinion, the court

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[2] [Continued]

5. Purchase journals.
6. Vouchers.
7. Paid bills.
8. Invoices.
9. Cash receipts journal.
10. Billings.
11. Bank statements.
12. Cancelled checks and check stubs.
13. Payroll records.
14. Contracts and copies of contracts, including all retainer agreements.
15. Financial statements.
16. Bank deposit tickets.
17. Retained copies of income tax returns.
18. Retained copies of payroll tax returns.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Telephone company statement of calls and telegrams, and all telephone toll slips.
22. Records of all escrow, trust or fiduciary accounts maintained on behalf of clients.
23. Safe deposit box records.
24. Records all purchases and sale of all stocks and bonds.
25. A complete list of all partners, associates and employees, together with their home addresses.
26. All W-2 forms of each partner, associate and employee.
27. Workpapers.
28. Copies of Tax Returns.

[3] Production of such documents is not protected by the Fifth Amendment. See *Shapiro* v. *United States*, 335 U.S. 1, 33 (1948).

seemingly accepted the government's argument that the documents' contents were themselves not privileged (see *id.* at 25a). The court wrote, however (*id.* at 25a-26a; emphasis in original):

> [T]he relevant inquiry is * * * whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher* v. *United States*, 425 U.S. 391 (1976). * * *
>
> * * * * *
>
> With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights.

The district court reached this conclusion even though the government had represented on the record that no subsequent use would be made of respondent's act of production and had suggested that respondent be given the "functional equivalent of use immunity" with respect to the act of production (J.A. 25, 28-29, 34-35; C.A. App. 75a-76a; Memorandum in Support of Motion for Reconsideration at 21-22).

2. The court of appeals affirmed (Pet. App. 1a-21a). The court first rejected the government's argument that a sole proprietor, like an officer of a corporation or unincorporated association or a member of a partnership, should not be permitted to assert the Fifth Amendment privilege when served with a subpoena for the records of his business or organization. The court nevertheless acknowledged that "the Government's position has considerable analytic appeal" (*id.* at 6a) and that permitting a sole proprietor to assert the Fifth Amendment privilege " 'only because of the form of business organization' " he has chosen results in " 'an irrational hole in the constitutional system of regulation of crime detection' " (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980)).

The court next concluded that respondent was entitled to resist the subpoenas at issue here on Fifth Amendment grounds. The court stated flatly that "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (Pet. App. 14a). The court began by noting the rule, derived from *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), that the Fifth Amendment protects an individual against the compelled production of his private papers (Pet. App. 8a). The court acknowledged that *Fisher* v. *United States*, 425 U.S. 391 (1976), had "seemingly diverged from" that rule by concluding that "the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, 'applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*' " (Pet. App. 9a, quoting *Fisher*, 425 U.S. at 408). The court of appeals nevertheless asserted (Pet. App. 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

The court of appeals also concluded that respondent was entitled to invoke the Fifth Amendment privilege because, in the court's view, the act of producing the documents amounted to a potentially incriminating communication (Pet. App. 14a-17a). The court distinguished *Fisher*, where a similar argument was rejected, on the ground that there " '[t]he existence and location of the papers [was] a foregone conclusion' " (*id.* at 15a, quoting *Fisher*, 425 U.S. at 410), whereas in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (Pet. App. 15a; emphasis added).

The court added that enforcement of the subpoenas would require respondent to authenticate the documents sought (Pet. App. 15a). Observing that "many (although certainly not all) of the subpoenaed records * * * most

likely were prepared by the appellee," the court stated (*ibid.*) that "[t]he record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation."

The court next held (Pet. App. 18a-19a) that respondent was entitled to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all the documents sought by the subpoenas, including those that respondent had not prepared. The court relied (*id.* at 18a & n.17) upon the government's acknowledgment that the contents of the documents sought might tend to incriminate respondent.

Finally, the court held that respondent could assert the Fifth Amendment privilege despite the government's representation that the act of producing the documents would not be used against him and despite the government's request that he be afforded the functional equivalent of use immunity with respect to the act of production, because the immunity proposal was not described with sufficient specificity (Pet. App. 19a-20a).[4]

SUMMARY OF ARGUMENT

This case presents the question whether a sole proprietor served with a subpoena *duces tecum* for his company's standard business records may properly resist compliance by asserting the Fifth Amendment privilege.

I.

It is clear that the Fifth Amendment does not protect the contents of business records voluntarily prepared be-

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[4] Following the quashing of the subpoenas at issue here, respondent was indicted and convicted of various charges stemming from the grand jury investigation. Execution of sentence was suspended, and respondent was placed on probation and fined. However, the grand jury investigation is continuing, production of the requested documents is still needed, and there remains the possibility that the contents of the documents would incriminate respondent as to offenses other than those for which he has already been convicted. Accordingly, the case is not moot.

fore a subpoena for them is issued. The Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" was intended to preclude the practice of forcing suspects "to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). The privilege therefore applies only when the government compels an individual to make a self-incriminating testimonial communication.

When an individual voluntarily prepares, collects, or maintains documents, no compulsion is present, and the Fifth Amendment privilege does not apply. If the individual is subsequently served with a subpoena *duces tecum* seeking those documents, he is compelled by the subpoena to produce them but not "to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the [individual], for the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U.S. 391, 409 (1976)). In short, the Fifth Amendment privilege does not shield the contents of documents that were voluntarily prepared, collected, and maintained, because the contents of such documents are not the product of proscribed government compulsion. This broad principle obviously applies whether or not the person upon whom the subpoena is served is the author or owner of the documents.

In holding that the contents of a sole proprietorship's business records are privileged even though created without government compulsion, the court of appeals relied upon *Boyd* v. *United States*, 116 U.S. 616 (1886), which the court interpreted as creating a zone of privacy shielding "private papers," including the standard business records of companies doing business as sole proprietorships. In fact, however, *Boyd* was not based upon a "protection-of-private-papers principle" (Pet. App. 11a n.7) but upon a series of rules long since "washed away" (*Fisher*, 425

U.S. at 409). Most notably, *Boyd* rested upon the proposition that the government could not search for or seize "mere evidence" but only fruits or instrumentalities of crime. That rule, which drew no distinction between papers and other forms of property, was overturned in *Warden* v. *Hayden*, 387 U.S. 294 (1967).

Granting privileged status to the contents of a sole proprietorship's records is also inconsistent in policy with a long line of decisions of this Court holding that the Fifth Amendment provides no grounds for resisting subpoenas demanding the records of corporations, partnerships, and unincorporated associations even if production of the records could incriminate their custodian. As far as the Fifth Amendment is concerned, there is no principled reason for treating the records of sole proprietorships any differently. The difference between a corporation or partnership and a sole proprietorship is often nothing more than a legal formality and does not inherently reflect the size, structure, activities, or longevity of the businesses. It simply makes no sense to hold that the records of a large company doing business as a sole proprietorship are protected by a zone of personal privacy, while the records of a one-person corporation are held in representative capacity and are thus outside the scope of Fifth Amendment protection.

It is also illogical to hold that the Fifth Amendment protects the contents of preexisting business records when they are sought by subpoena, since the Court held in *Andresen* that the contents of seized papers are not privileged under the Fifth Amendment. To be sure, a subpoena compels production of the documents whereas a search does not, but that does not explain why the privileged status of the documents' *contents* should differ.

While it is our submission that the Fifth Amendment does not protect the contents of any papers created without government compulsion, the "zone of privacy" rationale in any event does not support recognition of the privilege in a case like this. The subpoena called only for common types of business records such as bank state-

ments, vouchers, invoices, and payroll records. It did not seek records like diaries or personal letters that touch upon more intimate aspects of an individual's life. The possibility remains that other constitutional guarantees may regulate the power to compel production of such documents.

II.

A.

While *Fisher* made clear that the contents of preexisting business records are not privileged under the Fifth Amendment, it left open the possibility that the act of producing such documents might be considered testimonial, either because it concedes their existence, possession, and control or because it indicates the witness's belief that the papers produced are those described in the subpoena (see 425 U.S. at 410). We submit, however, that where the documents sought are standard business records, the act of production generally does not rise to the level of testimonial self-incrimination. By producing such records, a sole proprietor may tacitly admit that they exist and are in his possession. But since such documents are kept by virtually every business from the smallest family concern to the largest conglomerate, these tacit assertions "add[] little or nothing to the sum total of the Government's information" (*Fisher*, 425 U.S. at 411) and are thus not sufficiently testimonial to implicate the Fifth Amendment. Furthermore, the fact that a sole proprietorship possesses the sort of documents maintained by virtually all other businesses (as distinct from the contents of the document) is hardly incriminating.

The act of producing documents might also be considered testimonial insofar as it authenticates them. But in the vast majority of cases, such tacit authentication of standard business records is neither sufficiently testimonial nor sufficiently incriminating to justify assertion of the Fifth Amendment privilege. Authentication is a narrow, technical requirement for the admissibility of evidence at trial. While a sole proprietor's act of producing

documents in response to a subpoena should, if not privileged, suffice for authentication, the burden on the government of authenticating standard business records by other means is slight, and the testimonial value of the sole proprietor's tacit authentication is correspondingly small.

By the same token, any tacit authentication inherent in the act of production is unlikely to be incriminating. By producing documents in response to a subpoena, an individual merely expresses his belief that they are those described in the subpoena. The individual does not vouch for the truth of their contents. Furthermore, tacit authentication is not alone sufficient for admission of business records, since other requirements, most notably the hearsay rule, must also be satisfied.

In special circumstances, the act of producing business records might constitute testimonial self-incrimination, but unless the individual asserting the privilege can make the requisite showing in a particular case, his claim should be denied. Here, the courts below erroneously permitted respondent to make a blanket assertion of the privilege without any concrete showing of how the production of any of the requested documents, many of which were generated by others or were self-authenticating, could incriminate him.

B.

Whether in particular circumstances the act of producing documents amounts to testimonial self-incrimination is admittedly not always an easy question. Litigation concerning this issue is burdensome for the judiciary and often delays and consequently interferes with important grand jury investigations. Yet this question is of little intrinsic importance to the parties, except for its potential utility in thwarting the investigation. It is hotly contested in many cases only because its resolution often dictates whether the grand jury will gain access to the documents' unprivileged contents. In reality both the government and the individual resisting the subpoena are

generally concerned only with access to contents and not with any tacit assertions implicit in the act of production.

The simple and obvious solution to this problem is to require compliance with subpoenas for standard business records but to recognize that the compulsion inherent in the subpoena leads to conferral of automatic constructive use immunity on the witness who has invoked his privilege, precluding the introduction against him in any subsequent criminal proceedings of evidence of the act of production. This procedure obviates the need for unproductive litigation, permits prompt grand jury inspection of the documents' unprivileged contents, and fully protects the Fifth Amendment rights of the person served with the subpoena, since he is assured that any testimony inherent in the act of production will not be used against him. Much the same result may be achieved by a formal grant of immunity with respect to the act of production, but we see no reason why this more burdensome procedure need be employed.

In the present case, the government gave binding assurances that the act of production would not be used against respondent and suggested that respondent be given corresponding immunity. There was, accordingly, no valid reason for quashing the subpoenas in this case.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MAY NOT PROPERLY BE INVOKED BY A SOLE PROPRIETOR IN RESPONSE TO A SUBPOENA FOR PREEXISTING BUSINESS RECORDS

The court of appeals affirmed the quashing of the subpoenas duces tecum in this case on essentially two grounds: first, that the contents of a sole proprietorship's business records are privileged under the Fifth Amendment; and, second, that respondent's act of producing those documents would necessarily amount to compelled testimonial self-incrimination. As we discuss in Point I, logic and precedent establish that the contents of preexisting business records are not privileged under the Fifth

Amendment. We also show (Point IIA) that the act of producing standard business records does not ordinarily rise to the level of testimonial self-incrimination and has not been shown to do so here. In Point IIB we argue that even if the act of producing the documents implicated respondent's Fifth Amendment rights, he was not entitled to resist the subpoenas because of the availability of use immunity with respect to the act of production.

I. The Contents Of A Sole Proprietorship's Preexisting Business Records Are Not Privileged Under The Fifth Amendment

A. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." As the Court often has noted, the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, " 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.' " *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Consistent with the language and history of the Fifth Amendment, this Court has repeatedly indicated that the privilege against self-incrimination applies only when the accused is *compelled* to make an incriminating statement. See, *e.g.*, *Andresen*, 427 U.S. at 477; *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928). As the Court stated in *Andresen* (427 U.S. at 477), "unless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of the Fifth Amendment's protection."

This Court has also consistently held that the privilege applies only when the accused is forced to make a *testimonial* communication that is incriminating and not when

he is forced to become the source of "real or physical" evidence. See *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *Holt* v. *United States*, 218 U.S. 245 (1910).

It follows from these principles that the Fifth Amendment does not protect an individual against use by the government of incriminating documents voluntarily prepared by him, and that a subpoena for such documents may not be resisted solely because of the self-incriminatory potential of their contents. Although the act of turning over a document pursuant to subpoena is most assuredly compelled, it involves no *testimony* about the contents of the document,[5] but merely their physical delivery.[6] And to the extent that the document itself is testimonial in nature, the Fifth Amendment is inapplicable because the creation of the document did not spring from the compulsion of the subpoena. As one leading authority has stated (E. Cleary, *McCormick on Evidence* § 128, at 269 (2d ed. 1972)), preparation of such documents

> may or may not have been testimonial, depending upon whether [the author] intended that the transcription serve the function of communicating his thought to another individual, but in any event authorizing the use of such transcriptions would not encourage police to exert the types of coercion that the privilege historically protected against, because by definition these transcriptions would have been made before the opportunity for coercion existed.

B. Any doubt that the contents of preexisting business documents are not privileged under the Fifth Amendment

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[5] As we will presently have occasion to discuss, the act of producing a document might be considered testimonial in other respects. See pages 30-38, *infra*.

[6] See also 8 J. Wigmore, *Evidence* § 2264, at 380 (McNaughton rev. 1961) (stating that the contents of documents are not privileged because they are "already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process * * *").

is dispelled by this Court's decision in *Fisher* v. *United States*, *supra*. There, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the taxpayers' possession. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of documents even when written by the person asserting the privilege (425 U.S. at 410 n.11).[7] Rather, the Court observed, the privilege applies only when the accused is *compelled* to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by

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[7] That the Fifth Amendment privilege does not exist for the purpose of protecting personal privacy is manifest from the fact that it may be overridden by a grant of immunity that fully protects against prosecutive use. *Kastigar* v. *United States*, 406 U.S. 441 (1972).

him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court recognized (*id.* at 410), however, that in some circumstances the compelled act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them.

It is thus clear from *Fisher* that although the *act of producing* a document might arguably constitute a testimonial act within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the *contents* of the document. See *United States* v. *Schlansky*, No. 82-5200 (6th Cir. June 16, 1983, slip op. 5; *United States* v. *Namer*, 680 F.2d 1088, 1092 & n.8 (5th Cir. 1982); *United States* v. *Doe*, 628 F.2d 694, 695 (1st Cir. 1980); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980); *United States* v. *Bray*, 546 F.2d 851, 855 (10th Cir. 1976). This is so because the writing of the document was not itself compulsory and its production does not require the person asserting the privilege "to restate, repeat or affirm the truth of [its] contents * * *" (*Fisher*, 425 U.S. at 409). See also *Andresen*, 427 U.S. at 477 ("the statements seized were voluntarily committed to paper before the police arrived to search for them"); *In re Grand Jury Empanelled (Mankovitz)*, 603 F.2d 469, 476-477 (3d Cir. 1979); *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 860-861 & n.24 (3d Cir. 1979); *United States* v. *Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977).

C. In holding that the contents of respondent's business records were privileged under the Fifth Amendment, the court below relied (Pet. App. 11a n.7; see also *id.* at 8a, 13a-14a) upon a "protection-of-private-papers principle" derived from this Court's decision nearly a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). As this Court has pointed out, however, *Boyd* was built upon legal foundations that have long since been obliterated

(*Fisher*, 425 U.S. at 408-409), and if *Boyd* ever embodied a "protection-of-private-papers principle," that principle has no place in modern Fifth Amendment jurisprudence.

In *Boyd*, a partnership was believed to have fraudently evaded paying the tariff on imported plate glass. The penalty for this offense was forfeiture of the imported goods, and therefore the government seized the glass and instituted forfeiture proceedings. Pursuant to statute, the district court ordered production of invoices that the government alleged would establish fraudulent nonpayment of duties. This same statute provided that failure to comply with such an order would be treated as an admission of the government's allegations. The partners complied under protest, and judgment of forfeiture was entered. 116 U.S. at 616-618.

This Court reversed, holding that the order and statute violated the Fourth and Fifth Amendments. The opinion began by stating that the order requiring production of the invoices constituted a search and seizure within the meaning of the Fourth Amendment "because it is a material ingredient, and effects the sole object and purpose of search and seizure" (116 U.S. at 622). Turning to the question whether this search and seizure was "unreasonable," the opinion looked to the common law to determine whether a search for the invoices would have constituted a trespass (*id.* at 622-633). Relying principally upon the English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 [C.P. 1765], it concluded that a search and seizure were unreasonable unless the government's title to the items seized was superior to that of the person from whom they were taken. Thus, the government could search for and seize stolen property, since the possessor did not have title (116 U.S. at 624). Likewise, the government could search for and seize goods on which duty was owed, because "the government has an interest in them for the payment of the duties thereon" (*ibid.*). But the government could not search for and seize mere evidence because property law did not give the government title to such items (*id.* at 624-633).

Having concluded that the order compelling production of the invoices had violated the Fourth Amendment, the Court still faced the question whether their admission in the forfeiture proceeding had been erroneous, since the exclusionary rule for Fourth Amendment violations would not be adopted until 31 years later in *Weeks* v. *United States*, 232 U.S. 383 (1914). Noting (116 U.S. at 633) "the intimate relation[ship] between" the Fourth and Fifth Amendments, the Court held that the admission into evidence of books and papers obtained in violation of the Fourth Amendment constituted a violation of the Fifth Amendment. It stated (116 U.S. at 633): "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

What is perhaps most remarkable about *Boyd* is how little of its reasoning has stood the test of time. As the Court noted in *Fisher*, although the *Boyd* rule that "a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court" (425 U.S. at 408), the foundations for the rule "have been washed away" (*id.* at 409). Today it is well established (a) that a partnership such as the Boyd firm may not resist production of its records on Fifth Amendment grounds (*Bellis* v. *United States*, 417 U.S. 85 (1974)); (b) that an order compelling production of invoices is not a search or seizure because there can be no reasonable expectation of privacy in such documents, which are knowingly exposed to the public (see *United States* v. *Miller*, 425 U.S. 435, 440-443 (1976); *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967)); (c) that, even assuming such an order constituted a search and seizure, the Fourth Amendment permits the seizure of "mere evidence" (*Warden* v. *Hayden*, 387 U.S. 294 (1967)); (d) that, again assuming that such an order was a search and seizure, the Fifth Amendment was not violated because no testimonial communication was compelled (*Andresen* v. *Maryland*, *supra*); and (e) that the

introduction of evidence obtained in violation of the Fourth Amendment does not violate the Fifth Amendment (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). "In consequence," the Court observed in *Fisher* (425 U.S. at 409) "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."

We recognize that at the conclusion of its opinion in *Fisher* this Court stated (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' see *Boyd* v. *United States*, 116 U.S. at 634-635.

Although *Fisher* thus refrained from expressly deciding the question presented by this case, its reasoning indisputably reflected disapproval of the view expressed in *Boyd* that the *contents* of an individual's papers are protected from compulsory production by the Fifth Amendment. Indeed, the court below acknowledged as much, stating that "[b]efore *Fisher* * * * the prevailing rule was that 'the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony'" (Pet. App. 8a; citation omitted), but that "[i]n *Fisher* the majority seemingly diverged from these precedents * * *" (*id.* at 9a). See also *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8; *In re Grand Jury Proceedings (Martinez)* *supra*, 626 F.2d at 1055; *United States* v. *Bray*, *supra*, 546 F.2d at 855 (*Boyd* "laid to rest" by *Fisher*). Nevertheless, the court below brushed off this Court's "divergence" in *Fisher* and stated that it "continued to recognize *Boyd's* protection-of-private-papers principle (Pet. App. 11a n.7).

As our previous discussion makes clear, however, the decision in *Boyd* was not based upon a "protection-of-

private-papers principle.[8] *Boyd* did not rest upon the special status of books and records as opposed to other forms of property but upon the fact that the government did not have superior title to and consequently could not seize mere evidence.[8] As this Court stated in *Gouled* v. *United States*, 255 U.S. 298, 309 (1921) (emphasis added), which reaffirmed *Boyd* and applied it to a traditional search and seizure conducted pursuant to a facially valid warrant:

> *There is no special sanctity in papers, as distinguished from other forms of property*, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, * * * and lottery tickets, under a statute prohibiting their possession with intent to sell them * * * and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

During the era when *Boyd* held sway, seizures of incriminating papers were consistently upheld in cases such as *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); and *Abel* v. *United States*, 362 U.S. 217, 238 (1960), subject

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[8] Dictum in *Boyd* is frequently cited (see, *e.g.*, Pet. App. 8a) in an attempt to show that private papers are entitled to special Fifth Amendment protection. But the real meaning of this dictum was simply that the owner's title to these goods was superior to the government's. This is the point the Court was making when, after observing that property rights are " 'sacred and incommunicable in all instances where [they have] not been taken away or abridged by some public law for the good of the whole,' " it wrote (116 U.S. at 627-628 (emphasis added), quoting *Entick* v. *Carrington, supra*): " 'Papers are the owner's *goods and chattels*; they are his dearest *property* * * *.' "

only to the then-prevailing requirement that the papers constitute instrumentalities of crime rather than "mere evidence." All these cases refute the notion that *Boyd* conferred special status upon papers either for Fourth or Fifth Amendment purposes.

D. In attempting to distinguish *Fisher*, the court below relied upon the fact that the documents at issue in that case were neither written nor owned by those asserting the privilege (Pet. App. 10a, 11a n.7). See also *United States* v. *Miller*, 660 F.2d 563, 567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). Conceivably these factors may have some bearing upon the question whether the *act of producing* subpoenaed documents is sufficiently testimonial to invoke Fifth Amendment protection, but we fail to see what relevance these factors can possibly have with respect to whether the documents' *contents* are privileged. *Fisher* is based upon the principle that the Fifth Amendment prohibits the government from compelling an individual to make a self-incriminating statement. When preexisting records are sought by subpoena, the person upon whom the subpoena is served is not compelled to affirm the truth of the records' contents—and this is true whether or not that person is the author or owner of the papers.

Indeed, the opinion in *Fisher* leaves no doubt that a person may not resist a subpoena or summons on Fifth Amendment grounds simply because he prepared or wrote the incriminating papers sought. The Court there stated (425 U.S. at 410; emphasis added): "The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." The Court added (*id.* at 410 n.11): "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege."

Moreover, it is apparent that many of the documents sought by the subpoenas in this case—such as telephone

toll records, bank statements, and bank deposit tickets—were prepared by persons other than respondent. The court of appeals itself conceded (Pet. App. 16a) that "certainly not all * * * of the subpoenaed records * * * were prepared by [respondent]." Thus, even if authorship of the documents had some bearing upon the privileged status of their contents, that factor could not justify the court of appeals' decision.

As for ownership, while the *Fisher* Court assumed that the taxpayers did not have title to the accountants' workpapers, the taxpayers undoubtedly paid to have those papers prepared, and they readily obtained possession of the papers from their accountants after learning of the IRS investigation. Thus, if ownership of the papers had been the determinative fact in *Fisher*, the result in that case would have been different if the taxpayers had purchased the papers from their accountants for nominal consideration or if the accountants had relinquished possession with donative intent. We do not believe that the decision in *Fisher* was based upon any such fine distinctions of property law totally divorced from the policy of the Fifth Amendment. To read *Fisher* in that way would mark a return to the discredited reasoning of *Boyd*, under which the extent of the protection afforded by the Fifth Amendment depended upon the common law of property and trespass. As the Ninth Circuit stated in rejecting a similar interpretation of *Fisher* (*In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1028 (1976) (emphasis in original)):

> We read *Fisher* as resting on a broader principle. It permits compulsion by way of a summons or subpoena to produce documents when their *production* does not "ordinarily compel the taxpayer to restate, repeat or affirm the truth of the content of the documents sought." Mere ownership of an accountant's work papers does not convert the production of such papers into an affirmation of the truth of their contents.

The effect and clear intent of the court of appeals' decision is to make *Fisher* a very narrow exception to *Boyd*'s "prohibition against forcing the production of private papers." *Fisher*, 425 U.S. at 409. Under the court's approach, the bankrupt *Boyd* rule remains fully in effect, except presumably in cases involving the same peculiar factual situation as *Fisher*, *i.e.*, where the papers sought were not written or prepared and are not owned by the person upon whom the subpoena is served. That situation will arise relatively infrequently and can be easily avoided simply by transferring title to the documents. Accordingly, the court of appeals' decision necessarily drains *Fisher* of much of its precedential significance and replaces it with a rule based upon nothing more than the facts of the *Boyd* case and dictum taken out of context from a 200-year-old English decision concerning common law trespass.

E. The decision below granting privileged status to the documents of a sole proprietorship is not only inconsistent with settled principles of Fifth Amendment law as discussed in *Fisher*, but it is at odds with a line of pre-*Fisher* decisions holding that the records of incorporated and unincorporated organizations are not protected by the Fifth Amendment. In *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court held that a corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated. Subsequently, the Court extended this holding to require the custodian of corporate books and records to produce them pursuant to a subpoena even though he personally might be incriminated by their production. *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911). In time, the Court likewise held that the Fifth Amendment privilege may not be asserted when the records of a labor union (*United States* v. *White*, 322 U.S. 694 (1944)), political party (*Rogers* v. *United States*, 340 U.S. 367 (1951)), or business partnership (*Bellis* v. *United States*, *supra*) are sought.

We submit that there is no substantial basis for treating the records of corporations, partnerships, or other types of organizations differently from the records of sole proprietorships. When a subpoena is issued for preexisting business records, there is no more testimonial compulsion on the sole proprietor than there is on the corporate officer or partner and no greater hazard of personal incrimination.

The difference between a corporation and a sole proprietorship is often nothing more than a legal formality and does not reflect the size, structure, activities, or longevity of the business. A sole proprietorship may, for example, consist of a chain of retail stores employing numerous persons and doing millions of dollars in business annually, while a corporation may consist of nothing more than a single store operated by the corporation's sole stockholder. See *Wild* v. *Brewer*, 329 F.2d 924 (9th Cir. 1964) (the sole stockholder of a corporation held not entitled to assert privilege with respect to corporate records). In recent years, moreover, thousands of physicians, lawyers, dentists, and other professionals have incorporated, principally for tax purposes. It would be anomalous indeed if the contents of the records maintained by such persons enjoyed no Fifth Amendment protection, while those of their colleagues who continued to practice as sole proprietors remained fully protected. See *United States* v. *Radetsky*, 535 F.2d 556, 568-569 (10th Cir. 1976) (doctor held not entitled to assert privilege with respect to records of professional corporation consisting of two doctors). Similarly, there is no reason why the decision to take a partner should have such a profound effect for Fifth Amendment purposes. See *Bellis* v. *United States*, *supra* (attorney held not entitled to assert privilege with respect to records of three-partner law firm).

The court below offered no principled defense of the distinction it drew between a sole proprietorship and other forms of business organization. Indeed, it stated that the distinction was "irrational" (Pet. App. 6a n.3, quoting *Martinez*, 626 F.2d at 1056), and that treating all busi-

ness organizations in the same way for Fifth Amendment purposes had "considerable analytic appeal." Nevertheless, the court felt compelled to reach the result it did because of dictum in *Bellis*, 417 U.S. at 87-88, to the effect that the Fifth Amendment privilege immunizes the business records of a sole proprietor (Pet. App. 6a-8a). That dictum, however, was expressly based on the *Boyd* interpretation of the privilege that was subsequently disavowed in *Fisher*.[9]

Respondent seeks to defend the "irrational" distinction between the scope of protection afforded the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other, on the ground that it reflects the difference between an individual and an artificial entity or collective group (see Br. in Opp. 9). However, respondent's argument is untenable because the corporate officer or partner who may be compelled to produce documents that incriminate *him* is not an artificial entity or a collective group. To be sure, one of the stated bases for the rule that the privilege cannot be employed by an individual to avoid production of corporate or partnership records is that such records are held in a representative and not in an individual capacity. See, *e.g.*, *Bellis*, 417 U.S. at 89. But that is not the primary basis for the rule, as is demonstrated by *Grant* v. *United States*, 227 U.S. 74 (1913), which held that the privilege

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[9] *Bellis* stated (417 U.S. at 87-88):

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635 * * *. The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States*, *supra* * * *.

is inapplicable even where the corporation is defunct and title to its records has passed to its sole stockholder. See also *Bellis*, 417 U.S. at 96 n.3; *Wheeler* v. *United States*, 226 U.S. 478 (1913); *United States* v. *Hankins*, 565 F.2d 1344, 1349 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979). Rather, this Court enunciated the primary basis for the rule when it stated in *United States* v. *White*, *supra*, 322 U.S. at 700 (citations omitted):

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate government regulations.[10]

The particular form a business assumes says nothing about "[t]he scope and nature of its economic activities." Accordingly, when the economic activities of a business entity are the focus of investigation, as is true in this case, the availability of the privilege should not depend on the technical form of the business's organization. See

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[10] See 8 J. Wigmore, *supra*, § 2259b, at 360 ("The reason why the privilege is not available to the custodian [of records of a collective group] is that * * * [g]roups frequently are powerful and their illegal doings frequently are provable only by their records; and, since economic crimes (as contrasted with common law crimes) are usually not even *discoverable* without access to business records, a rule which privileged the production of such records whenever they incriminated the custodian would result in many (rather than few) of the violators going free").

In re Witness Before the Grand Jury, 546 F.2d 825, 827 (9th Cir. 1976).

F. Insofar as it rests upon the conclusion that revelation of the contents of documents is itself shielded by the cloak of the Fifth Amendment privilege, the decision below creates a further anomaly. Its result is that the contents of a sole proprietorship's records are privileged when sought by subpoena, but those same records may be seized and their contents may be examined by police executing a valid warrant. *Fisher*'s application with respect to the seizure of documents was clarified in *Andresen*, which held that the seizure of business records and their introduction into evidence at trial does not violate the Fifth Amendment. Rejecting the contention that the contents of such records are protected by the privilege, the Court stated succinctly (427 U.S. at 473):

> [P]etitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing.

The Court then explained (*ibid.*) that Andresen had neither turned over nor authenticated the records and thus had not been compelled to incriminate himself by performing either of those acts.

Andresen thus plainly stands for the proposition that the contents of preexisting business records are not privileged—as Justice Brennan expressly acknowledged in his dissent (see 427 U.S. at 486)—and that such records may be obtained by subpoena unless the act of production constitutes testimonial self-incrimination. We of course recognize that the production of a document pursuant to subpoena involves an element of compulsion that the seizure of the same document pursuant to search warrant does not. But that distinction is irrelevant to the question whether the *contents* of the document are privileged. Whether preexisting documents are obtained by subpoena or by warrant, creation of those documents was not compelled, and therefore their contents are not privileged under the Fifth Amendment.

The illogic of the result produced by the decision below was recognized by the Fifth Circuit in *United States* v.

Davis, *supra*, 636 F.2d at 1042: "It is difficult to find a logical reason for applying the *Boyd* principle to subpoenaed documents and not documents taken in a search, as in *Andresen*." See also *Andresen*, 427 U.S. at 485, 486 (Brennan, J., dissenting); *Martinez*, 626 F.2d at 1056. Nevertheless, the Fifth Circuit concluded in *Davis* (636 F.2d at 1042) that, "[h]owever illogically," its own prior opinions "limit *Andresen* to documents taken in a search." But see, *e.g.*, *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8.

Not only is the different treatment given seized and subpoenaed documents illogical, but, if accepted by this Court, it will have an untoward effect upon privacy by "prevent[ing] the lesser intrusion of subpoena while permitting the greater intrusion of search and seizure" (*Martinez*, 626 F.2d at 1056). A search is more intrusive on privacy interests than a subpoena because it almost inevitably entails disclosure to official view of matters in the home or place of business beyond those specifically subject to seizure. This concern is heightened in the case of document searches, because of the relatively broad character that such a search must often assume; thus, this Court has recognized that a search and seizure of a person's papers presents "grave dangers" not present in a search for physical objects, because in searches for papers "it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen*, 427 U.S. at 482 n.11. See also *National City Trading Corp.* v. *United States*, 635 F.2d 1020, 1024 (2d Cir. 1980).[11] Although the subject of a search warrant can seek the return of papers alleged to have been improperly seized, he is then in the position of

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[11] Of course, investigators are free to proceed by search rather than subpoena if they possess probable cause and can secure an adequately particularized warrant. *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). The point here is simply that, where a subpoena would suffice, it makes little sense from the standpoint of protecting private interest to adopt rules that needlessly encourage the use of searches.

"one attempting to close the barn door after the horses have escaped." *United States* v. *Abrams*, 615 F.2d 541, 549 n.2 (1st Cir. 1980). By contrast, although a subpoena too can be overbroad, the party whose papers are being sought is in a position to seek judicial narrowing of the subpoena or a protective order *prior* to compliance. See Fed. R. Crim. P. 17(c); *United States* v. *Abrams*, *supra*, 615 F.2d at 549 n.2. In short, the likely effect of the disparate treatment of seized and subpoenaed documents endorsed by the court of appeals will be to encourage the use of search warrants and to discourage the use of subpoenas, even though the latter are plainly far less intrusive.

G. Under the logic of *Fisher*, reaffirmed in *Andresen*, the contents of even the most personal papers would not appear to be privileged under the Fifth Amendment. *See United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975). Nevertheless, the accountant's workpapers in *Fisher* were clearly business papers (see *ICC* v. *Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980)), and the Court there stated that neither the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary" nor "First Amendment values" were at issue (425 F.2d at 401 n.7). Similarly, in *Andresen*, the Court was careful to limit its holding to searches and seizures of "business records" (427 U.S. at 465, 475, 477). And the courts of appeals have repeatedly read *Fisher* to apply only to business documents. See *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8; *ICC* v. *Gould*, *supra*, 629 F.2d at 859 n.22; *United States* v. *Doe*, *supra*, 628 F.2d at 695; *Martinez*, 626 F.2d at 1054-1055 & n.2; *United States* v. *Abrams*, *supra*, 615 F.2d at 547; *United States* v. *Helina*, 549 F.2d 713, 716 n.3 (9th Cir. 1977). But see *United States* v. *Davis*, *supra*, 636 F.2d at 1042. For example, in holding that the Fifth Amendment does not apply to the contents of the business records of a sole proprietor, the First Circuit emphasized (*Martinez*, 626 F.2d at 1054 n.2) that

> this case does not involve subpoena of papers more intimate or personal than business records. The ap-

> plicability of *Fisher* v. *United States* to non-business, intimate personal papers such as private diaries or drafts of letters or essays is an open question. See *id.* at 401 n.7 * * *. There may be additional sources of protection, such as the First Amendment or the personal autonomy component of the due process clause of the Fourteenth Amendment, which direct that the Fifth Amendment apply to the contents of such writings.

The present case too involves business records of the type that are generally kept in the ordinary course of business, not personal papers such as diaries or personal correspondence. As Justice Brennan noted in his concurrence in *Fisher*, 425 U.S. at 425-426, business records do not touch upon "the more intimate aspects of one's life." See also *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting). In Judge Friendly's words: "The writings typically sought to be produced [by subpoena] are not the outpourings of an individual's soul, for which the first amendment protection against subpoena may be in order, but rather the books and records of an enterprise that is criminal or has been unlawfully conducted." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 703 (1968). Thus, to the extent that *Fisher* and *Andresen* left open the issue whether personal diaries and letters may be subpoenaed or seized by the government, that issue is not presented in this case either. The sort of documents involved here—such as vouchers, paid bills, and bank statements (Pet. App. 33a)—are not "the outpourings of an individual's soul." [12]

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[12] Although the issue thus need not be reached here, it is our view that it would be unjustified to extend the Fifth Amendment privilege beyond its traditional role of protecting against compelled testimonial disclosures, in order to serve privacy interests associated with particular types of documents. In the first place, as we previously noted (page 27 note 11, *supra*), the privacy-protection component thereby injected into Fifth Amendment analysis is entirely incompatible with the settled principle that disclosure can be

II. Any Testimonial Self-Incrimination Inherent In The Act Of Producing Standard Categories Of Business Records Held By A Sole Proprietorship Is Cured By Prohibiting The Introduction In Subsequent Proceedings Of Proof Of The Act Of Production

While this Court in *Fisher* indicated that the contents of preexisting documents are not privileged under the Fifth Amendment, it did acknowledge (425 U.S. at 410) that

> the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States*, 354 U.S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment.

In *Fisher*, the Court did not attempt to provide a "categorical" answer to these questions but instead held that the act of producing the records sought in that case did

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compelled through an adequate grant of immunity. Beyond that, use of the Fifth Amendment privilege for this purpose is probably unnecessary. Certainly it is not immediately apparent why unreasonable and unjustified official examination of intimately private documents cannot be adequately controlled through application of First and Fourth Amendment principles, which after all embody the relevant policies. For example, it may be appropriate to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a personal diary, as a matter of Fourth Amendment law; but it makes absolutely no sense, in terms of privacy protection concerns, to make the right to read the diary turn upon whether it is found during a lawful search of an automobile or produced pursuant to a subpoena.

not amount to testimonial self-incrimination (425 U.S. at 410-411). Similarly, in this and the vast majority of cases involving subpoenas for the standard business records of sole proprietorships, we believe that the act of production does not rise to the level of testimonial self-incrimination. More important, it seems perfectly clear that any testimonial self-incrimination inherent in the act of production is at most slight; that in virtually every case, the sole objective of the subpoena is to obtain access to the contents of the documents, which are not privileged; and that when compliance with such subpoenas is resisted on Fifth Amendment grounds the witness's motive for resisting the subpoena is likewise almost invariably based upon the documents' contents. See *Doe*, 626 F.2d at 1056. Under these circumstances, it makes little sense to prevent the grand jury from examining the records' contents because of the largely theoretical possibility that the act of production might be used to incriminate the person upon whom the subpoena is served. Instead, any basis for Fifth Amendment objection in cases of this sort may be removed by a rule prohibiting the use in any subsequent criminal proceedings of proof of the act of production against the witness who has asserted his privilege at the subpoena stage.

A. *The Act of Producing Standard Categories of Business Records Held by a Sole Proprietorship Generally Does Not Constitute Testimonial Self-Incrimination*

As previously noted, the act of producing documents might be considered testimonial in two ways: it may concede the existence and possession of the papers sought and it may indicate a belief that the papers produced are those described in the subpoena.

1. It seems clear that admitting the existence and possession of standard business records rarely could amount to testimonial self-incrimination within the protection of the Fifth Amendment. In *Fisher*, after noting that the papers at issue were "the kind usually prepared by an accountant working on the tax returns of his

client," the Court concluded (425 U.S. at 411; citation omitted):

> The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. * * *"

This reasoning applies equally to most if not all of the documents sought by the subpoenas in this case, such as general ledgers, vouchers, paid bills, and invoices. Such documents are kept by virtually every business, from the smallest family concern to the largest conglomerate, and therefore conceding their existence, possession, and control "adds little or nothing to the sum total of the Government's information" (*ibid.*). As the court of appeals stated in *Martinez*, 626 F.2d at 1055, the facts admitted by honoring such a subpoena "in most cases will be so trivial that the Constitution is not implicated." See also, *e.g.*, *United States* v. *Davis*, *supra*, 636 F.2d at 1041; *United States* v. *Praetorius*, 622 F.2d 1054, 1063 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979); *United States v. Osborn*, *supra*, 561 F.2d at 1339.

An individual claiming the Fifth Amendment privilege must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); see also, *e.g.*, *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (Fifth Amendment "protection must be confined to instances where the witness has reasonable cause to apprehend danger"); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951) ("real danger of legal detriment"); *Mason* v. *United States*, 244 U.S. 362, 365 (1917) (must be "real danger" and not just "remote possibilities out of the ordinary course of law"). While their contents may be inculpatory, the mere admission of possession and control of standard business records does not itself pose such a substantial, realistic threat.

2. As noted, the act of producing documents might also be considered testimonial insofar as it authenticates them. But where standard business records are sought, the possibility that tacit authentication would amount to testimonial self-incrimination is slight at best and is frequently nonexistent.

In order to understand the scope of protection furnished in this context by the Fifth Amendment privilege, it is necessary to keep in mind precisely what is meant when it is said that production of documents may "authenticate" them. Authentication is a narrow, technical requirement for the admissibility of evidence at trial.[13] See E. Cleary, *McCormick on Evidence* § 218, at 543-545 (1972 ed). Evidence presented to a grand jury need not be authenticated (see Fed. R. Evid. 101, 1101(d)(2); *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359 (1956)), and therefore any "authentication" inherent in the production of documents in response to a grand jury subpoena cannot be said to incriminate an individual with respect to such proceedings.

Under the Federal Rules of Evidence, authentication is a "condition precedent to admissibility" that must be "satisfied by evidence sufficient to support a finding that

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[13] The traditional requirement of authentication has been strongly criticized by commentators. See, *e.g.*, Broun, *Authentication and Contents of Writings (Law and the Social Order)*, 1969 Ariz. St. L. J. 611, 624-634; Erich, *Unnecessary Difficulties of Proof*, 32 Yale L.J. 436, 441-445 (1923); Levin, *Authentication and Content of Writings*, 10 Rutgers L. Rev. 632, 634-641 (1955-1956); E. Cleary, *McCormick on Evidence*, § 218, at 545 (2d ed. 1972); Strong, *Liberalizing the Authentication of Private Writings*, 52 Cornell L. Rev. 284 (1967). The modern trend has been to liberalize the requirement, if not to dispense with it entirely. For example, the provisions of the Federal Rules of Evidence dealing with authentication have been described as going "as far toward generalizing the principle of self-incrimination as would be possible without abandoning altogether the basic premise that some sort of authenticating proof should be required." 5 D. Louisell & C. Mueller, *Federal Evidence* § 505, at 12 (1981).

the matter in question is what its proponent claims." Fed. R. Evid. 901(a). While testimony that a sole proprietor produced certain papers in response to a subpoena for his business records would ordinarily suffice for authentication, in the vast majority of cases such records could also be authenticated in several other ways. Many business documents maintained by a sole proprietorship are written by persons other than the owner—such as his employees and persons with whom he does business—and could therefore be authenticated by the author's testimony.[14] If the author cannot or will not testify, authentication may be accomplished through the testimony of another person who witnessed the document being written or who received, typed, delivered, mailed, filed, read, or otherwise acquired familiarity with it.[15] A sole proprietorship's business ledgers and journals can be authenticated by any employee, former employee, or other individual who made entries or saw entries being made;[16] such documents and other business records may also be authenticated by a person who merely had supervisory authority over or is familiar with the company's record-keeping procedures.[17] Even documents prepared exclusively by the

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[14] *United States* v. *Gipson*, 609 F.2d 893, 894-895 (8th Cir. 1979); 5 D. Louisell & C. Mueller, *supra* note 13, § 507, at 27; E. Cleary, *supra* note 13, § 220, at 545; 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(b)(1)[01], at 901-21 to 901-22 (1982); 7 J. Wigmore, *Evidence* § 2131, at 712 & n.2 (Chadbourn rev. 1978).

[15] *In re Clifford*, 566 F.2d 1023, 1025 (5th Cir. 1978) (witnessed signing); *McGuire* v. *Davis*, 437 F.2d 570, 573 (5th Cir. 1971) (received); 5 D. Louisell & C. Mueller, *supra* note 13, § 507, at 27; E. Cleary, *supra* note 13, § 219, at 545; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-20.

[16] See *United States* v. *Helberg*, 565 F.2d 993, 997 (8th Cir. 1977); E. Cleary, *supra* note 13, § 219, at 545 & n.12.

[17] See, *e.g.*, *United States* v. *Smith*, 609 F.2d 1294, 1301-1302 (9th Cir. 1979) (witness familiar with record-keeping procedures); *United States* v. *Ullrich*, 580 F.2d 765, 771-772 (5th Cir. 1978) (witness familiar with record-keeping procedures); *United States*

sole proprietor, kept by him in a private file, and never seen by any other person may be authenticated by expert or nonexpert testimony concerning the genuineness of the sole proprietor's handwriting (Fed. R. Evid. 901(b)(3));[18] indeed, the trier of fact may draw its own conclusion about authenticity after comparing the documents with a specimen of the sole proprietor's handwriting (*ibid.*). Documents may even be authenticated based upon their "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" (Fed. R. Evid. 901(b)(4)).[19] This rule has been construed to permit the authentication of a business's correspondence based upon its letterhead.[20] Authentication may also be based upon distinctive language patterns evident in a document,[21] and "a coincidence or 'match' between content and a course of events

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v. *Evans*, 572 F.2d 455, 490 (5th Cir. 1978) (witnesses had used records and were familiar with record-keeping procedures); *United States* v. *Colyer*, 571 F.2d 941, 947 (5th Cir. 1978) (familiarity), cert. denied, 439 U.S. 933 (1978); *United States* v. *Reese*, 568 F.2d 1246, 1252 (6th Cir. 1977) (familiarity); *United States* v. *Page*, 544 F.2d 982, 987 (8th Cir. 1976) (familiarity); *Peter Eckrich & Sons, Inc.* v. *Selected Meat Co.*, 512 F.2d 1158; 1159 (7th Cir. 1975) (supervisory authority); 4 D. Louisell & C. Mueller, *supra* note 13, § 446, at 662-667; E. Cleary, *supra* note 13, § 219, at 545.

[18] See *Andresen*, 427 U.S. at 473 (authentication by expert); *United States* v. *Dreitzler*, 577 F.2d 539, 553 n.24 (9th Cir. 1978) (authentication by former secretary), cert. denied, 440 U.S. 921 (1979); *United States* v. *Kilgore*, 518 F.2d 496, 498 (5th Cir. 1975) (authentication by assistant based on initials), cert. denied, 425 U.S. 950 (1976) and 430 U.S. 905 (1977).

[19] See, *e.g.*, *United States* v. *Luschen*, 614 F.2d 1164, 1174 (8th Cir.), cert. denied, 446 U.S. 939 (1980); *United States* v. *Goichman*, 547 F.2d 778, 782-784 (3d Cir. 1976); 5 D. Louisell & C. Mueller, *supra* note 13, § 515, at 78; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(4)[01]-901(b)(4)[04], at 901-46 to 901-58.

[20] See *United States* v. *Gordon*, 634 F.2d 639, 643-644 (1st Cir. 1980); 5 D. Louisell & C. Mueller, *supra* note 13, § 512, at 57-58 (same rule should apply to printed business forms); 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(4)[02], at 901-53 to 901-54.

[21] See Fed. R. Evid. 901(b), advisory committee note.

or behavior, as established by other evidence, sometimes serves as circumstantial evidence of authentication." [22]

A witness need not be absolutely certain of his testimony in order to authenticate evidence.[23] And the showing required for authentication need not be accomplished by the testimony of any single witness or by any single type of authentication evidence.[24]

In short, the difficulty of authenticating standard business records at trial is not great and infrequently proves an obstacle to admissibility.[25] It follows that the testimonial value of any authentication inherent in the act of producing documents is correspondingly small.

By the same token, such tacit authentication is unlikely to be incriminating. It is important to remember that by producing documents in response to a subpoena an individual merely indicates his belief that the documents are those described in the subpoena (*Fisher*, 425 U.S. at 412-413), and that fact is seldom incriminating. The matters disclosed by the documents may well be incriminating, but an individual who complies with a documentary subpoena does not certify the truth of their contents. Nor is such tacit authentication alone sufficient to permit the documents' admission at trial to prove the matters asserted therein.[26] Since business documents are hearsay

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[22] 5 D. Louisell & C. Mueller, *supra* note 13, § 515, at 78.

[23] See, *e.g.*, *United States* v. *Johnson*, 637 F.2d 1224, 1247-1248 (9th Cir. 1980); D. Louisell & C. Mueller, *supra* note 13, § 507, at 26; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-21 to 901-22.

[24] D. Louisell & C. Mueller, *supra* note 13, § 507, at 26; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-22.

[25] See D. Louisell & C. Mueller, *supra* note 13, § 505, at 12.

[26] Fed. R. Evid. 901(b) advisory committee note; *United States* v. *One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979); *Rhoads* v. *Virginia-Florida Corp.*, 476 F.2d 82 (5th Cir. 1973).

when offered to prove the truth of their contents, they are admissible only if they fall within an exception to the hearsay rule (Fed. R. Evid. 801, 802).

The exception under which such records are usually admitted is that for regularly kept records. Rule 803(6) of the Federal Rules of Evidence, which codifies this exception, requires testimony that the records were made at or near the time of the events recorded, that they were made "by, or from information transmitted by, a person with knowledge," and that "it was the regular practice of that business * * * to make [such] record[s]." Under the plain language of this exception, the mere fact that a custodian of business records produced them in response to a subpoena is not enough.

In sum, the tacit authentication implicit in the act of producing standard business records has little if any testimonial value and is very unlikely to incriminate. The possibility of incrimination by tacit authentication is far less a reality than a fiction claimed for the purpose of preventing grand juries from seeing documents whose *contents* are incriminating but are not shielded by the Fifth Amendment. Quashing a grand jury subpoena, on the other hand, may cause great harm. "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen * * *" (*Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972)).

> "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone*, 429 F.2d 138, 140 (C.A. 2 1970).
> * * *

Id. at 701; see also *Calandra*, 414 U.S. at 344. It would be grossly disproportionate to block a grand jury's access to unprivileged evidence that may be highly probative and important simply because of the largely theoretical possibility that the act of production might be used as incriminating authentication evidence in a subsequent trial. Quashing a subpoena in such a situation "provides the individual with a remedy far exceeding the scope of his Fifth Amendment privilege." *Martinez*, 626 F.2d at 1056.

3. While we think it clear that the act of producing standard business records does not generally rise to the level of testimonial self-incrimination, special circumstances might dictate a different conclusion. But it is up to the individual asserting the privilege to "show a realistic possibility that his answer will be used against him." *Pillsbury* v. *Conboy*, No. 81-825 (Jan. 11, 1983), slip op. 3 n.1 (Marshall, J., concurring). See also, *e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 279 (10th Cir. 1983); *In re Grand Jury Empanelled (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979); *United States* v. *Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). True, the witness is not required "to prove the hazard in the sense in which a claim is usually required to be established in court," because he would thereby be "compelled to surrender the very protection which the privilege is designed to guarantee" (*Hoffman* v. *United States*, *supra*, 341 U.S. at 486). But it must be evident from the facts brought to the court's attention that furnishing the requested document would create a real and substantial threat of self-incrimination. *Ibid.*; *Marchetti* v. *United States*, *supra*, 390 U.S. at 53; *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953). When no special circumstances are evident, a subpoena for standard business records should be enforced. As the Tenth Circuit wrote recently in rejecting a bare assertion of Fifth Amendment privilege similar to respondent's (*In re Grand Jury Subpoena Duces Tecum*, *supra*, 697 F.2d at 279):

> Whether the act of producing documents in response to a subpoena is both testimonial and incrimi-

nating is a difficult issue whose resolution depends "on the facts and circumstances of particular cases or classes thereof." [*Fisher*, 425 U.S.] at 411 * * *; see also *id.* at 414-30 * * * (Brennan, J., concurring). Our review of this question here is rendered impossible by the [witnesses'] failure to specify * * * the origin of each document * * *. We cannot determine to which documents the *Fisher* analysis may be applicable. We will not speculate or render what is in essence an advisory opinion.

The burden of establishing the applicability of a privilege rests on the party seeking to assert it. * * * The [witnesses'] broad declarations simply do not meet this burden.[27]

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[27] It is implicit in *Hoffman*, 341 U.S. at 486-487, that a witness who claims the Fifth Amendment privilege may not simply refuse to testify but must assert the privilege in response to particular questions. Only then can the judge determine "from the implication of the question, in the setting in which it is asked," whether an answer would be incriminating (*ibid.*). Thus, contrary to the suggestion in the opinion below (Pet. App. 18a-19a), the courts of appeals have almost uniformly held that a witness may not rest upon a blanket assertion of the Fifth Amendment privilege when called to testify in a criminal trial or grand jury proceeding. See, *e.g.*, *United States* v. *Rodriguez*, 706 F.2d 31, 37 (2d Cir. 1983); *United States* v. *Horton*, 629 F.2d 577, 579 (9th Cir. 1980); *United States* v. *Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974). While this issue appears to have arisen less frequently in cases involving document subpoenas, the same rule should apply in that context. See *In re Grand Jury Subpoena Duces Tecum*, *supra*, 697 F.2d at 279.

As previously noted, an individual claiming the Fifth Amendment privilege has the burden of showing that it is properly asserted. See pages 38-39, *supra*. If a factual record is required to adjudicate the claim, an *in camera* hearing may be held. See *In re Katz*, 623 F.2d 122, 126-127 (2d Cir. 1980); *United States* v. *Goodwin*, *supra*, 625 F.2d at 701; *United States* v. *Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *United States* v. *Gomez-Rojax*, 507 F.2d 1213, 1220 (5th Cir.), cert. denied, 423 U.S. 226 (1975); *United States* v. *Fox*, 549 F. Supp. 1362, 1363-1364 (S.D.N.Y. 1982). Testimony at this hearing may be made inadmissible in subquent proceedings. *In re Katz*, *supra*, 623 F.2d at 127; *In re Grand Jury Empaneled (Markowitz)*, *supra*, 603 F.2d at 474-475.

4. When the principles just outlined are applied to the present case, it is apparent that the courts below erred in holding that respondent was entitled to resist production of all of the records sought by the five subpoenas.

Most, if not all, of those documents were standard business records of the type maintained by virtually every business, and their existence, location, and control in respondent's hands were thus a "foregone conclusion" (*Fisher*, 425 U.S. at 411). The court of appeals attempted to refute this argument by observing that there is "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (Pet. App. 15a; emphasis added). However, the government seldom if ever knows "as a certainty" that subpoenaed documents exist and are subject to a witness's control. Even if the government has incontrovertible evidence that the witness had possession and control of the documents in the very recent past, the possibility will always exist that the documents were subsequently removed or destroyed. In *Fisher* itself, there was nothing to suggest that the government knew "as a certainty" when it issued the summons that the taxpayers had kept control of the papers at issue rather than transferring them to someone else or destroying them.

The court of appeals likewise erred in concluding that respondent was entitled to resist compliance with the subpoenas on the ground that the tacit authentication resulting from the act of production would automatically constitute meaningful testimonial self-incrimination. Without requiring respondent to show that tacit authentication posed a realistic threat of testimonial self-incrimination or even to make a particularized claim of privilege, the court permitted him to rest upon a blanket assertion of Fifth Amendment privilege with respect to every document sought by the subpoenas except for those required to be kept by law. The court wrote (Pet. App. 16a):

"Here * * * many (although certainly not all) of the subpoenaed records * * * most likely were prepared by [respondent]." But since respondent did not prepare and could not vouch for the accuracy of all the documents sought, the court of appeals' reasoning was directly contrary to *Fisher*, where this Court found (425 U.S. at 413) that any tacit authentication resulting from production of subpoenaed papers did not invoke Fifth Amendment protection because

> [t]he taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination.

The court of appeals also observed (Pet. App. 16a) that "[t]he record contains no explanation by the United States as to how documents [prepared by respondent] could be authenticated without [respondent's] explicit or implicit participation." But this is odd reasoning indeed: respondent may resist production of the documents on grounds of self-incrimination because the government may be *unable* to use those documents against him at any subsequent trial. Obviously the government could not tell specifically how, or if, many of the documents could be authenticated until they were turned over. And while "the record" does not contain an abstract discussion of the various methods of authenticating business documents without the assistance of their custodian (see Pet. App. 16a), available alternatives are well known (see pages 33-36, *supra*), and their likely application to the documents sought in this case is straightforward.

For example, of the 28 categories of records sought by the third subpoena issued in this case, at least 13[28] and

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[28] See page 2 note 2, *supra*, categories 6-8, 10-12, 14, 16-18, 21, 26, 28. The same is true of the telephone toll records sought by the first subpoena (see Pet. App. 26a), the bank statements, cancelled

probably 16 [29]—including vouchers, paid bills, invoices, billings, bank statements, cancelled checks, contracts, bank deposit tickets, tax returns and telephone toll records [30]—consisted of documents that were almost certainly prepared or read by other persons, and therefore those persons were potentially capable of authenticating them.[31] The various business journals listed in that subpoena [32] could be authenticated by any employee or other person who made entries, saw entries being made, used those books, had supervisory authority over them, or was familiar with the company's record-keeping procedures. And any document that could not be authenticated by one of these methods might be authenticated based upon handwriting analysis or the document's own distinctive characteristics.

Finally, the court of appeals reasoned (Pet. App. 18a) that respondent had no obligation to show that the act of producing the subpoenaed documents might incriminate him because "the Government already [had] conceded that all of the papers it seeks are potentially incriminating." However, as previously noted, the mere fact that

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checks, check stubs, and bank deposit tickets requested by the second and fifth subpoenas (see Pet. App. 30a, 36a), and at least 12 of the 25 categories of documents listed in the fourth subpoena (*i.e.*, categories 5-10, 12-13, 15-17, 25).

[29] Categories 22-24. In addition, "financial statements (third subpoena, category 15; fourth subpoena, category 14) may have been prepared by someone other than the sole proprietor and were likely sent to someone else, such as a bank or creditor. "Workpapers" (third subpoena, category 27) and a list of employees (third subpoena, category 25) would fall under the same rule if prepared or seen by someone other than the sole proprietor, such as an employee, bookkeeper, or accountant. Similarly, "[c]orrespondence and memoranda" (fourth subpoena, category 24), if sent to the sole proprietor, could be authenticated by their authors.

[30] See page 2 note 2, *supra*; Pet. App. 33a.

[31] See page 34, *supra*.

[32] Categories 1-5, 9, 19-20.

the *contents* of subpoenaed records may be incriminating does not demonstrate that the act of producing them would constitute testimonial self-incrimination.

B. *When a Documentary Subpoena Is Resisted on the Ground That the Act of Production Would Constitute Testimonial Self-Incrimination, Fifth Amendment Rights are Fully Protected and Interference With Grand Jury Investigations Is Minimized by Requiring Production but Excluding Evidence of the Act of Production in Future Proceedings*

1. As previously noted, in virtually every case where a subpoena for standard business records is resisted on the ground that the act of production would be self-incriminating, what is really of concern to both parties is disclosure of the documents' unprivileged contents. Furthermore, any testimonial self-incrimination inherent in the act of production is slight at best. To block the grand jury's access to the documents' *contents* on act-of-production grounds would allow a small and technical tail to wag a large substantive dog. Moreover, litigation concerning whether under particular circumstances the act of production rises to the level of testimonial self-incrimination—an issue of little direct importance to either party—places a needless burden on the courts and may harmfully delay critical grand jury probes.

There are several possible solutions to these problems, but in our judgment the simplest and best is to require production of the documents while automatically conferring upon a witness who has invoked his privilege a constructive use immunity with respect to any future use in a criminal prosecution of the act of production. The Sixth Circuit recently employed this procedure in *United States* v. *Schlansky*, No. 82-5200 (June 16, 1983), slip op. 7, where an IRS summons was enforced over Fifth Amendment objection. Noting that "[t]here [was] no serious question as to the existence or location of the documents," the court addressed the contention that the taxpayer might incriminate himself by means of the tacit

authentication inherent in the act of production (slip op. 7):

> This case does not concern an attempt by the government to use the act of production as authentication of the documents. If the government should attempt to authenticate the [documents] as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time. Such proof would seek to add testimonial value to the otherwise testimony-free act of production.

This procedure—requiring compliance with the subpoena over Fifth Amendment objection but excluding evidence of the act of production—allows the grand jury access to the contents of preexisting (and therefore unprivileged) business records; it avoids in nearly all cases the need to litigate the largely hypothetical question whether the act of production constitutes testimonial self-incrimination; and it fully protects the witness's Fifth Amendment rights. If the government seeks to introduce proof of the act of production against the witness in a subsequent criminal prosecution, "the witness has a valid objection to the evidence on the ground that he was coerced by court order to reveal it and that it is therefore compelled self-incrimination barred from use by the Fifth Amendment." *Manness* v. *Meyers*, 419 U.S. 449, 474 (1975) (White, J., concurring). Any evidence obtained by derivative use of the act of production would also be excluded, although it seems quite unlikely that the act of production could be put to such use.[33]

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[33] As previously noted, the existence and control of standard business records are almost always a foregone conclusion even before a subpoena for such records is issued. And insofar as the act of production indicates the sole proprietor's belief that the documents turned over are those listed in the subpoena, that "testimony" is not likely to lead to the discovery of other incriminating evidence. Consequently, excluding evidence of the act of production will almost always furnish a simple and complete remedy.

This procedure also does not compel the witness to incriminate himself with respect to the grand jury proceedings. Since the existence and control of standard business records are almost invariably a foregone conclusion, conceding those facts by producing such records does not amount to testimonial incrimination. And since grand jury evidence need not be authenticated, the possibility that the act of production might supply a needed method of authentication is not present.[34] Finally, any chance that the act of production might be used against the witness by the grand jury may be negated by allowing the witness to turn over the documents to a third party—such as the court or prosecutor—who would then furnish them to the grand jury without revealing their origin. Cf. *United States* v. *Porter*, No. 83-1278 (7th Cir. July 6, 1983), slip op. 14.[35]

While the Sixth Circuit has followed the procedure we believe preferable, the First Circuit has achieved the same end through a somewhat different approach, illustrated by its decisions in *Martinez* and *Doe*. In those cases, the court determined that compelling the possessor of subpoenaed documents to comply with the subpoena would produce incriminating authentication evidence. However, rather than simply quashing the subpoenas and thereby

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[34] Moreover, it is well settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of a defendant's Fifth Amendment privilege." *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); see also *United States* v. *Blue*, 384 U.S. 251 (1966); *Costello* v. *United States*, *supra*.

[35] In *Porter*, the court prevented any possibility that the act of production might be used against the witness by requiring not only use immunity with respect to the act of production but also "a protective order forbidding the government from referring in any way before the grand jury or at trial to the fact that [the witness] produced the documents" (slip op. 14). While we believe that such a prohibition would be implicit in the exclusionary rule we advocate or in a grant of act-of-production immunity, we would have no objection to the entry of such a protective order as an additional safeguard of the witness's rights.

denying the grand jury access to the records' unprivileged contents, the court attempted to "[h]armoniz[e] the government's right of lawful access to the contents of personal business records with the possessor's right not to have the testimonial implication of his submission used against him * * *" (*Martinez*, 626 F.2d at 1056). Concluding that the federal immunity statutes, 18 U.S.C. 6002 and 6003, authorize the granting of act-of-production immunity (*ibid.*), the court remanded the case to the district court so that the government would have the opportunity to grant the sole proprietor use immunity with respect to the act of producing the subpoenaed documents (*id.* at 1058). The court in *Doe* followed the same procedure (628 F.2d at 697).

While we believe that the First Circuit was correct in holding that act-of-production immunity may be granted under 18 U.S.C. 6002 and 6003[36] and that such a grant removes any possible basis for resisting compliance with a documentary subpoena on act-of-production grounds, this procedure appears to us to be a needlessly burdensome one that may unnecessarily delay the grand jury's work without conferring any needed protection on the witness beyond that inherent in the automatic immunity approach. In any event, since the grand jury's objective in such cases is uniformly to secure access to contents of subpoenaed documents, not to obtain act-of-production authentication, we believe either method of recognizing the appropriate limited immunity would be satisfactory.

2. In the present case, the government urged the court to adopt one of these approaches. The government agreed in the district court not to use respondent's act of production against him in any way (see page 4, *supra*)

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[36] The immunity statutes were designed "to restrict the grant of immunity to that required by the United States Constitution." *United States* v. *Apfelbaum*, 445 U.S. 115, 122 (1980). Therefore, where the contents of subpoenaed documents are not protected by the Fifth Amendment privilege, a statutory grant of immunity may be limited to the arguably privileged act of production. See *United States* v. *Porter*, *supra*, slip op. 12 n.4.

and offered several suggestions for implementing that proposal. The government suggested that respondent turn over the documents to a third party, such as the district court or his own attorney (see J.A. 25; C.A. App. 74a-75a). Alternatively, the government suggested that the court could grant respondent "the functional equivalent of use immunity" with respect to the act of production (Memorandum in Support of Motion for Reconsideration at 22; see also J.A. 34-35).

The district court rejected all these suggestions without explanation, and the court of appeals affirmed, stating that "no procedure ever was agreed upon and no formal immunization offer under 18 U.S.C. § 6002 or § 6003 was advanced" (Pet. App. 19a).

The court of appeals' reasoning was completely unsound. Since the district court rejected all the government's suggestions, the government can hardly be faulted because "no procedure ever was agreed upon" (Pet. App. 19a). And statutory immunity was not sought[37] because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to the contents of all documents not required to be kept by law, despite the fact that no valid Fifth Amendment claim could possibly be made on that basis. It is well settled that the government need immunize only that portion of the requested evidence for which a valid claim of immunity has been raised; although "a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972); see also *United States* v. *Apfelbaum*, *supra*, 445 U.S. at 122. Because

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[37] The government relied on Third Circuit precedent authorizing the granting of non-statutory immunity in analogous circumstances. *In re Grand Jury Empanelled (Markowitz)*, *supra*, 603 F.2d at 474 (hearing on applicability of attorney-client privilege); *In re Grand Jury Investigation ("A")*, 587 F.2d 589, 597-598 (3d Cir. 1978) (hearing on applicability of speech and debate clause); *United States* v. *Inmon*, 568 F.2d 326, 332-333 (3d Cir. 1977) (hearing on pretrial motion to dismiss on double jeopardy grounds).

respondent's Fifth Amendment claim was patently overbroad, the government was given the Hobson's choice of requesting that respondent be granted immunity to which he was not entitled or of suffering the consequences of a complete rejection of the subpoena.

The court of appeals also suggested that a judicial grant of use immunity with respect to the act of production would " 'intrude into an area which should be more appropriately left to prosecutorial discretion.' " (Pet. App. 20a, quoting *In re Grand Jury Matter*, 673 F.2d 688, 695-696 (3d Cir. 1982) (concurring opinion), cert. denied, No. 82-123 (Nov. 15, 1982)). However, the authority of the federal courts to create an exclusionary rule such as that adopted by the Sixth Circuit in *Schlansky* has strong precedent. See, *e.g.*, *Simmons* v. *United States*, 390 U.S. 377 (1968) (defendant's testimony at suppression hearing inadmissible at trial). Moreover, while we do not doubt that the prerogatives of the Executive Branch would be improperly abridged if a court conferred use immunity without the government's consent (see, *e.g.*, *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Drape*, 668 F.2d 22, 27 (1st Cir. 1982)), here, the prosecution itself has chosen to seek compelled production of the documents and is willing to accept the necessary consequences of conferring act-of-production immunity. We fail to see how prosecutorial discretion can be abridged if the prosecution's own immunity request is granted.

Even assuming that a formal request for statutory immunity was necessary, the court below should have followed the same course that the First Circuit took in *Martinez* and *Doe* by vacating the order quashing the subpoena and remanding so that the appropriate form of immunity could be extended. This procedure was especially appropriate in view of the district court's misconception about the scope of the immunity to which respondent was entitled. See *Martinez*, 626 F.2d at 1058. Not

only did the court of appeals refuse the government's request for such a remand, but the court's holding that the *contents* of a sole proprietorship's business records are privileged made it clear that no form of act of production immunity would have sufficed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN DOE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether an individual may invoke his Fifth Amendment right not to incriminate himself in response to a grand jury subpoena compelling him to produce his private papers where the government has stipulated the contents of the papers are incriminatory and relate to sole proprietorships?

2. Whether an individual's act of producing incriminating private papers, the existence of which is unknown to the government, is a testimonial communication protectable by the Fifth Amendment?

3. Whether the government's offer of "constructive use immunity" is co-extensive with an individual's Fifth Amendment right not to be compelled to produce incriminating documents, the existence of which is unknown to the government?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Statement of the Case 1

Summary of Argument 6

Argument:

I. An individual's Fifth Amendment right not to be forced to incriminate himself protects him from compelled production of his private documents. .. 7

II. Where existence, location and authentication of subpoenaed private papers is not demonstrated by the government the act of producing those documents by a target of a grand jury investigation is protectable under the Fifth Amendment. 17

III. The government's immunity offer is not coextensive with respondent's Fifth Amendment right. 21

Conclusion 25

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Andresen v. Maryland, 427 U.S. 463 (1976) 16

Bellis v. United States, 417 U.S. 85 (1974) 6, 13, 14

Boyd v. United States, 116 U.S. 616 (1886) ...8, 9, 10, 11, 15

Entick v. Carrington, 19 How. St. Tr. 1029 (1765) 9

Feldman v. United States, 322 U.S. 487 17

Fisher v. United States, 425 U.S. 391 (1976) .....
.....4, 6, 14, 15, 18, 19

Gilbert v. California, 388 U.S. 263 (1966) 17

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 17

Hoffman v. United States, 341 U.S. 479 (1951) 20

In re Grand Jury Proceeding (McCoy v. Sussman), 601 F. 2d 162 (5th Cir. 1979)..... 20

In re Katz, 623 F. 2d 122 (2d Cir. 1980) 20

Kastigar v. United States, 406 U.S. 441 (1972) 25

King v. Hayden, 96 Eng. Rep. 195 (K.B. 1762) 9

Murphy v. Waterfront Comm., 378 U.S. 52 (1963).....7, 8

Contents

Page

New Jersey v. Portash, 440 U.S. 450 (1979) 25

Roe v. Harvey, 98 Eng. Rep. 302 (K.B. 1769) 9

Schmerber v. California, 384 U.S. 757 (1966) 17

United States v. Calandra, 414 U.S. 338 (1973) 17

United States v. Dionisio, 410 U.S. 1 (1972) 17

United States v. Fox, No. 83-6055 (2nd Cir. October 19, 1983) 20, 21

United States v. Wade, 388 U.S. 218 (1967) 17

United States v. White, 322 U.S. 694 (1943) 11, 12, 13

Wilson v. United States, 221 U.S. 361 (1911).....11

United States Constitution Cited:

Fifth Amendment ....i, 2, 5, 6, 7, 9, 10, 13, 14, 15, 16, 17, 21, 24

Other Authority Cited:

L. Levy, Origins of the Fifth Amendment, 390 (1968) 9

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In November and December, 1980, five separate grand jury subpoenas were served on respondent, the target of a grand jury investigation. The subpoenas commanded respondent in his personal capacity to appear before a grand jury and produce his private papers, documents and records.

On November 19, 1980, the grand jury issued two subpoenaes to respondent requiring production of (1) the telephone toll records of five named companies, and (2) "all records including but not

limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four identified bank accounts (Pet. App. 28a, 31a).

On November 25, 1980, the grand jury issued a third subpoena to respondent calling for production of "any and all records as per the attached Schedule A for (a named company) for the period January 1, 1976 to present." Schedule A listed twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices, payroll records, contracts and copies of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee (Pet. App. 32a, 33a). A fourth subpoena was issued on December 19, 1980, seeking production of another laundry list of documents relating to another named company (Pet. App. 34a).

Finally, on December 29, 1980, the grand jury directed respondent to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of a named company maintained at certain banks (Pet. App. 36a).

In early January, 1981, respondent moved to quash the above subpoenas on the grounds that the compelled production of the records would violate his right against self-incrimination under the Fifth Amendment. The government conceded for purposes of the motion that the records sought related to sole proprietorships, that they were in respondent's possession and that they did incriminate respondent (Jt. App. 20, 21).

By opinion of February 4, 1981, the District Court granted substantially all the relief sought by respondent. It ordered only records required to be kept by law produced (Pet. App. 23a-27a). The District Court held the act of producing the records to have communicative aspects which warranted Fifth Amendment protection.

On February 19, 1981, the government moved for reconsideration and after briefs and oral argument and by order of April 8, 1981, said motion was denied.

The government appealed and the Court of Appeals for the Third Circuit affirmed. First the court rejected the government's argument that it must consider the size of the organization from which the records are subpoenaed and if it is of sufficient size the court should find a separate entity and apply those cases dealing with documents held by a collective group. The court stated:

> In *Bellis, supra,* the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the size of the organization, the records of which were being subpoenaed, but rather the nature of the capacity — either personal or representational — with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations that have recognizable juridical existence apart from [their] members," such as corporations or partnerships, and "those which do not," such as sole proprietorships. (citations omitted) While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:
>
> > It has long been established, of course, that the Fifth Amendment privilege against self-incrimination protects an individual from compelled production of his personal papers and effects as well

> as compelled oral testimony. . . . *The privilege applies to the business records of the sole proprietor as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added).

(Pet. App. 6a, 7a).

The court then analyzed the recent pronouncements from this Court finding under these cases "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (Pet. App. 14a).

The court next applied the rule of *Fisher* finding its three requirements present here. It found production by respondent of the subpoenaed records would result in (1) compulsion of a (2) testimonial communication that is (3) incriminating. Since compulsion was supplied by the subpoena and incrimination was stipulated by the government, the discussion was concerned with the testimonial communications required by production. The court recognized the two situations found in *Fisher* where production in response to a subpoena has communicative aspects, *i.e.*, (1) an admission of existence of the records and their possession and control by the target and (2) the authentication of the records by the target. As to the first, the court stated:

> In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be

> drawn from the broad-sweeping subpoenas is that the government, unable to prove that the subpoenaed documents exist — or that the appellee even is somehow connected to the business entities under investigation — is attempting to compensate for its lack of knowledge by requiring the appellee to become in effect, the primary information against himself.

(Footnote omitted, citation omitted.) (Pet. App. 15a, 16a).

As to the second requirement, the court noted that since the subpoenaed documents were most likely prepared by respondent they could not be authenticated without respondent's participation. Therefore, the court found responding to the subpoenaes would represent a substantial threat of self-incrimination protectable in this case by the Fifth Amendment.

Next, the court rejected the government's argument that respondent's Fifth Amendment claim was a "blanket claim" and not specific (Pet. App. 18a, 19a). The court found even if a "blanket claim" was originally posited it was not upheld by the District Court when it ordered production of all records required to be kept by law.

Finally, the court declined to reach the question of whether an award of use immunity by the government overrides respondent's Fifth Amendment claim since no offer of immunity was ever solidified or immunity granted (Pet. App. 19a, 20a).

SUMMARY OF ARGUMENT

I.

This case presents the question whether an individual can be compelled to produce incriminating private documents to a grand jury when he is the target of the investigation and invokes his Fifth Amendment right not to be a witness against himself.

This Court has never sanctioned what the government seeks in this case. In fact, on every occasion it has had the opportunity to rule in the area, it has made clear that the type of documents sought here are protectable by the Fifth Amendment. In *Bellis v. United States*, 417 U.S. 85 (1974) the Court found no Fifth Amendment protection in partnership records, but restated its long held position that "The privilege applies to the business records of the sole proprietor or sole practitioner as well as personal documents containing more intimate information about the individual's private life." *Id.* at 87.

II.

In addition to the above protection of the contents of the subpoenaed documents. *Fisher v. United States*, 425 U.S. 391 (1976) gives Fifth Amendment protection to the act of production. *Fisher* held an individual cannot be compelled to produce incriminating documents if production would entail the potentially incriminating testimonial acts of admitting their existence, possession and acknowledging their authenticity. Here where the government has utterly failed to demonstrate any connection between the individual subpoenaed and the documents, the admittance of the existence of the documents warrants Fifth Amendment protection.

III.

No immunity or exclusionary rule that does not include the contents of the subpoenaed documents is co-extensive with an individual's Fifth Amendment privilege where no connection has been shown by the government between the individual and the subpoenaed records.

ARGUMENT

I.

An individual's Fifth Amendment right not to be forced to incriminate himself protects him from compelled production of his private documents.

An analysis of the Fifth Amendment's protection of an individual from compelled production of incriminating documents must begin with an understanding of the policies underlying the privilege. As the Court stated in *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1963):

> The privilege against self-incrimination registers an important advance in the development of our liberty — "one of the great landmarks in man's struggle to make himself civilized." Ullmann v. United States, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair

> play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private life," United States v. Gruenwald, 233 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Quinn v. United States, 349 U.S. 155, 162. (Footnote omitted.)

While the most discussed policy underlying the protection of documents from compelled disclosure is the privacy rationale, *Boyd v. United States*, 116 U.S. 616 (1886), the other policies enunciated in *Murphy* are equally valid. For example, to permit the government to compel an individual to surrender his incriminating documents which the government intends to use against him, would strike a blow at "our preference for an accusatorial rather than an inquisitorial system of criminal justice" and the principle that "the government in its contest with the individual . . . shoulder the entire load. . . ." This is most striking where as here, many of the documents sought are readily available from other sources such as banks or other financial institutions. It should be preferred that before an individual is required to produce these documents the government exhaust its available sources, otherwise the individual will become his own chief accusor. This was clearly recognized by the court below when it stated:

> Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials.

> For example, many of the records sought from the appellee in this case no doubt could be obtained by the government from other sources. . . . In this case, however, the government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely that sort of expeditation that the fifth amendment traditionally has been interpreted to prevent.

(Footnote omitted.) (Pet. App. 17a).

The right of an individual to be free from self-incrimination through surrendering incriminating documents against his will to the government finds its origin in early English common law. L. Levy, *Origins of the Fifth Amendment,* 390 (1968); *Roe v. Harvey,* 98 Eng. Rep. 302, 305-6 (K.B. 1769); *Entick v. Carrington,* 19 How. St. Tr. 1029 (1765); *King v. Hayden,* 96 Eng. Rep. 195 (K.B. 1762). It was recognized by the framers of the Fifth Amendment as evidencing "their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction was more important than punishing the guilty." L. Levy, *supra,* 432. The framers recognized the Fifth Amendment to be "a central feature of the accusatorial system of criminal justice." L. Levy, *id.*

Decisions of this Court, beginning with *Boyd v. United States,* 116 U.S. 616 (1886), have consistently recognized that the Fifth Amendment protects an individual from compulsory production of his private records. While the government argues many of the teachings of *Boyd* are no longer valid, they fail to recognize *Boyd's* underlying basis is still sound.

In *Boyd,* the government brought an action against two business partners seeking the forfeiture of goods imported pursuant

to a fraudulent invoice. A statute then empowered the government to subpoena the invoices and provided that failure to comply would result in the forfeiture of the goods. The District Court enforced the subpoena over the Fourth and Fifth Amendment claims of the partners. In reversing the decision of the District Court, Justice Bradley stated:

> Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is abhorrent to the instincts of an American. It may suit the purposes of this despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id., 631-632.

The Court went on to hold that:

> . . . compulsory production of the private books and papers of the owners of goods sought to be forfeited . . . is compelling them to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution.

Id., 634-635.

In every decision since *Boyd* in this area, the Court has recognized the privacy rationale of the Fifth Amendment and in no case has the Court permitted the government what it seeks to do here.

Those cases permitting compulsory production of records from one holding them as a representative of a collective entity

all premised their decision on some compelling governmental interest and carefully preserved the individual's privilege. In *Wilson v. United States,* 221 U.S. 361 (1911) the Court held a corporation's records were not privileged from compelled disclosure. The Court carefully distinguished *Boyd* by stressing that in *Boyd* the papers in question were the "private papers of the claimant" while there the petitioner held them only in a representative capacity. And in *United States v. White,* 322 U.S. 694 (1943) the Court in holding a labor union's records not privileged, stated the rationale for this line of cases:

> The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. See Hale v. Henkel, supra, 70, 74; 8 Wigmore on Evidence (3d ed.) Sec. 2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organization so as to nullify appropriate governmental regulations.

> The fact that the state charters organizations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. Hale v. Henkel, supra; Wilson v. United States, supra. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities affective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state government to enforce their laws with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

Id. at 700-701.

And in discussing the personal nature of the privilege, the Court stated:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any

> personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

Id. at 698-699.

In *Bellis v. United States,* 417 U.S. 85 (1974), the most recent case dealing with the records of a collective group, the Court held partnerships records not protected by the Fifth Amendment. The Court cited with approval the above quoted language of Justice Murphy in *White* as justification for excepting from the privilege partnership records. *Id.* at 90-91. In so doing, the Court recognized the privacy policy of the Fifth Amendment, *id.* at 91, and the protection afford an individual's business records when it stated:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. . . .

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States* 409 U.S. 322 (1973); *Hill v. Philpott,* 445 F.2d 144 (7th Cir.) *cert. denied,* 404 U.S. 991 (1971); *Stuart v. United States,* 416 F.2d 459, 462 (5th Cir. 1969). As the Court explained in *United States v. White, supra,* at 698, "(t)he Constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also, *Curcio v. United States,* 354 U.S. 118, 125 (1957); *Couch v. United States, supra,* at 330-337.

Id. at 87-88.

In *Bellis,* the Court made clear that an individual has no legitimate expectation of privacy in records of a joint enterprise and that records of a law partnership are not privileged. However, *Bellis* recognized protection of records of (1) a small family partnership (2) a partnership of individuals in a pre-existing confidential relationship and (3) a loose non-organized association without existence independent of its individual members. *Id.*, 94, 101. Indeed in *Bellis,* the government even conceded the Fifth Amendment protection of records of a partnership of individuals in a pre-existing confidential relationship. *Id.* at 101.

In *Fisher v. United States,* 425 U.S. 391 (1975), the Court enforced summonses served on attorneys for documents given to

them by their clients. The documents sought however, were not documents belonging to the clients, but documents belonging to their accountants, which they had obtained and transferred to the attorneys. The Court first held that, although the summons did not compel the client to do anything, the client could still invoke his personal Fifth Amendment privilege as if the documents were in his own hands. The Court then held the records not protected by the client's personal privilege, since they were not his personal records but, rather his accountants'. To suggest as the government does, that *Fisher* overruled, *Boyd* is to ignore the plain language of the Court that it had not reached that issue. "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers', *see Boyd v. United States,* 116 U.S. at 634-635."

That statement from *Fisher* defines the difference between it and the instant matter. In *Fisher* the personal privilege was not applicable to documents of another while here, the personal privilege applies to the "private papers" of the respondent.

These rulings make clear that only a natural person may invoke the privilege where his documents are sought to be compelled from him. They restate the Court's long-standing concern for the rights of an individual and recognized a legitimate public policy concern that government be granted access to documents of collective entities. The ruling further manifests the historic concern for protecting personal privacy. The Court has held the Fifth Amendment creates a zone of privacy which protects an individual and his personal records from compelled production and permits the compulsion of an organization because the privacy interest of the individual is not invalid. Even in *Fisher,* so heavily relied on by the government, the Court recognized it did not deal with the private papers of the accused, but with documents of his accountant. Moreover, in *Fisher,* the Court recognized the

privacy interests served by the privilege "[W]ithin the limits imposed by the language of the Fifth Amendment . . . the privilege truly serves privacy interests." 425 U.S. at 399. Here compelling the individual to surrender admittedly self-incriminating private documents falls squarely within the limits of the language of the Fifth Amendment.

The government's reliance of *Andresen v. Maryland*, 427 U.S. 463 (1976) for the proposition that an individual can be compelled to produce his private documents is misplaced. In *Andresen*, the Maryland state's attorney's fraud unit suspected that Andresen had defrauded the purchaser of certain real estate. On probable cause the state obtained a search warrant to search Andresen's office and Andresen was eventually convicted based largely on evidence seized during execution of the warrant. On review of Andresen's motion to suppress the seized documents the Court held the search of Andresen's office for business records, their seizure and introduction into evidence did not violate his Fifth Amendment privilege. The Court found the privilege not violated because Andresen was never compelled to do or say anything. Here, such is not the case since it is respondent who is being compelled to produce the documents.

The distinctions between the protection afforded the seizure of personal records pursuant to a warrant and when sought by a subpoena are real and meaningful. The difference is grounded on the compulsion present when one is served with a subpoena as opposed to its lack thereof when a search warrant is involved. No compulsion or cooperation is required of the accused when a seizure takes place. Furthermore, although it can be more intrusive, the seizure requires an independent review prior to its execution by a neutral magistrate which offers greater protection than the subpoena which is issued at the mere request of the government. Finally, an accused can always deny knowledge of the existence of documents seized during a search which is hardly

feasible when the documents are subpoenaed. The distinctions are grounded in solid principles fundamental in purpose.

Virtually every case from this Court involving the Fifth Amendment, finds protection for an individual's "private papers" based on personal privacy. *Feldman v. United States,* 322 U.S. 487, 490 (the Fifth Amendment is designed "to maintain inviolate large areas of personal privacy"); *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965) ("The Fifth Amendment in its self-incriminating clause enables the citizen to create a zone of privacy which government may not force from him to his detriment"). *Schmerber v. California,* 384 U.S. 757, 763-764 (1966); *Gilbert v. California,* 388 U.S. 263, 266 (1966) ("The privilege reaches only compulsion of 'an accused's communications whatever form they might take', and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers' . . ."); *United States v. Wade,* 388 U.S. 218, 221 (1967); *United States v. Dionisio,* 410 U.S. 1, 11 (1972). ("The grand jury cannot require the production by a person of private books and records that would incriminate him"); *United States v. Calandra,* 414 U.S. 338, 346 (1973) (". . . a grand jury may not compel a person to produce books and papers that would incriminate him").

II.

Where existence, location and authentication of subpoenaed private papers is not demonstrated by the government the act of producing those documents by a target of a grand jury investigation is protectable under the Fifth Amendment.

The court below found that even if the contents of the subpoenaed documents were not protected under the respondent's privilege against self-incrimination, the act of producing them was

protected. In so finding the court recognized the testimonial nature of the act of production as set forth in *Fisher*. There this Court stated:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayers belief that the papers are those described in the subpoena. *Curcio v. United States*, 354 U.S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions do not lend themselves to categorial answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

425 U.S. at 410.

In *Fisher* the Court found the act of production there to be non-testimonial since the existence and location of the subpoenaed records was a "foregone conclusion". The Court stated:

> The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the government's information by conceding that he in fact has the papers.

425 U.S. at 411. There the Court established a low threshold an individual must pass to determine when the act of production constitutes acknowledgement of the existence of the material demanded. The act of production is protectable when it adds to the sum total of the government's information that the documents actually exist. In *Fisher* this Court found the act of production non-testimonial because it was undisputed the taxpayer's attorney possessed certain workpapers belonging to the taxpayer's accountant. Here no such concession has ever been advanced and indeed the court below found the opposite:

> In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoena's is that the government, unable to prove that the subpoenaed documents exist — or that the appellee even is somehow connected to the business entities under investigation (footnote omitted) — is attempting to compensate for its lack of knowledge by requiring appellee to become, in effect, the primary information against himself.

(Pet. App. 15a, 16a). (Citations omitted.)

Now the government argues that since the documents subpoenaed are the kind usually kept by businesses, their possession, existence and control by this respondent "adds little or nothing to the sum total of the government's information." But the conclusion that this respondent possesses these records is pure speculation. The production of each document would admit its existence, a fact of which there is absolutely no proof the

government is aware. The act of production here would furnish the government with not only records and documents of which it was unaware it would also provide the "missing link" between respondent and the business and bank accounts enumerated. *See Hoffman v. United States*, 341 U.S. 479 (1951); *In re Katz*, 623 F. 2d, 122, 126 (2d Cir. 1980). Such admissions by respondent where the government has stipulated the incriminating nature of the documents, are certainly real and substantial hazards of incrimination. *United States v. Fox*, No. 83-6055 (2nd Cir., October 19, 1983); *In re Grand Jury Proceeding (McCoy v. Sussman)*, 601 F. 2d 162, 170 (5th Cir. 1979).

A second testimonial aspect of the act of production as recognized in *Fisher* is authentication of the documents. The court below found many of the subpoenaed records were most likely prepared by respondent and would be authenticated by the respondent by the act of production as admitting they were what was demanded in the subpoena. The court relied on the District Court's finding that:

> The government can give no assurance that the act of turning over the documents will not constitute incriminating admissions against [respondent] either before the grand jury or at a subsequent trial if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [respondent's] testimonial communication, but it cannot satisfy this Court as to how that representation can be implemented to protect [respondents] in subsequent proceedings.

(Pet. App. 16a).

Now the government argues authentication is merely a "technical requirement" which they can accomplish by any number of means. But these arguments ignore the fact that once the records are turned over they are automatically vouched for by the subpoenaed party to the grand jury as being the records called for in the subpoena. *United States v. Fox, supra.*

III.

The government's immunity offer is not coextensive with respondent's Fifth Amendment right.

The immunity offer arose below in response to a query by the District Court regarding the effect of a turnover order that would preclude the government from using the act of production in any way (66a.10). In response, the Assistant United States Attorney stated "[respondent] could produce the documents to the agents of the grand jury" (71a.6), and that authentication of the same could be done "by other means" (75a.20). Nonetheless, the Assistant United States Attorney represented to the court that "once in evidence, [respondent] cannot stand up on the witness stand and say, this is not my writing if it is in fact his writing" (76a.17). He further stated, in response to the judge's question "can he be asked whether he turned it over to the grand jury?"; he answered, "Yes, I think he can" (76a.24). This served as the foundation for the District Court judge's conclusion in his opinion that:

> Moreover, the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [respondent] either before the grand jury or at a subsequent trial, if he is indicted.*

---

* The government's position is that although [respondent's] testimony would not be needed in proving authentication,

> existence or possession of said documents, the communications nevertheless would be a proper subject of cross-examination at trial, if [respondent] decided to testify in his own behalf.

(Pet. App. 26a).

At the oral argument of the government's motion for reconsideration in the District Court, the government attempted to clarify its position with respect to what it soon labeled "the functional equivalent of use immunity." The following colloquy is most enlightening:

> THE COURT: Yes. The authentication, let's assume that:
>
> Now, if we get to that point and the Government then says, well, take that element away because we can prove authentication — and I come back to the same thing I have asked, I think this is a third time, third hearing — what difference does that make? If the act of turning it over by the target is a concession of authentication what difference does it make that the Government can also prove authentication, if a Grand Jury can conclude by the target turning it over that he is authenticating it, how does a Grand Jury know that the Government can otherwise authenticate it? How do I know that the Grand Jury will not rely on the act of turnover as the authentication?
>
> MRS. DESMOND: Well, of course, the easy answer to that and the answer I am sure you will get quickly is the immunity that the Government has offered.

> THE COURT: Nobody has offered that. I asked that question at all of the prior hearings, in other words, and I kept saying how it is implemented, and the word "immunity" was never used. In fact, there was even a suggestion that the act of turnover could be utilized at the trial of this case, for instance, if the defendant elected to take the stand."

(106a-107a). The crux of the District Court's doubt over the offer and grant of the purported immunity is as follows:

> THE COURT: Let me say this, Mrs. Desmond, I think in our prior discussions with the Government that I indicated that if there was some way that I could be assured that the act of turn-over would not be utilized against a target for the reasons of authentication establishing that he had possession or that it was an acknowledgement of the identity and existence of the document, that if the Government could assure me that that could be accomplished realistically then I would order the turn-over. And I was not satisfied after the colloquy with Government counsel that it could be accomplished. And that's why we always came back to that question, if you tell me that the Government can authenticate it otherwise, how do I know, how can I be assured that the act of turn-over will not be utilized against the target for authentication purposes? And I never had that issue resolved to my satisfaction.
>
> If you can resolve it to my satisfaction, I have no hesitancy in saying, yes, I will direct the turn-over, but only on the condition that the act of turn-over will not be utilized against the target.

> And I think Mr. Politan would agree that if he had that assurance then there is no problem.

(108a.3-108a.24).

Simply put, the scope and the contours of the purported offer of use immunity was never solidified to the extent that the District Court or appellee could be reasonably sure of the preservation of the appellee's Fifth Amendment rights. In particular, it is not known whether the grand jury, at any time in the past or in the future, was cognizant of, or would be made aware of the outstanding subject grand jury subpoena. If the grand jury was cognizant at any time, of the subpoena, it would necessarily be aware of the fact of the respondent's act of production as soon as the sought-after documents appeared "out of thin air" as it were. Even if physically brought before the grand jury by one of its agents, the compelled testimonial act (production) stares the grand jury in the face. The nexus between the grand jury subpoena and the presence of the subject documents is apparent. This eventuality was never squarely faced by the government, and becomes more vital in view of the government's equivocation as to the precise scope of the allowable use of the act of production.

The Circuit Court agreed with the District Court that the government offer was vague (Pet. App. 20a, f. 19). It found, since no immunity was granted the issue was premature and it declined to reach the general question of whether a grant of use immunity could override an individual's Fifth Amendment privilege with respect to the act of production.

Here the government's argument is still nebulous. It has changed the name of the immunity offered from the "functional equivalent of use immunity" a term it never defined below, to "constructive use immunity" but has done little to clarify its scope and parameters. Its entire position rests mistakenly on their

conclusion that the existence, location and possession of the records is a "foregone conclusion". Where, as here, this is incorrect, to immunize the act of production and admit the incriminating existence location and possession necessarily immunizes the contents of the records. The immunity must extend to the fact of the document's existence to be coextensive with the privilege, *Kastigar v. United States*, 406 U.S. 441 (1972); *New Jersey v. Portash*, 440 U.S. 450 (1979).

CONCLUSION

For all the above reasons, it is respectfully requested this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases:	Page
Adams v. *Maryland*, 347 U.S. 179	6
Andresen v. *Maryland*, 427 U.S. 463	3
Brown v. *Walker*, 161 U.S. 591	15
Corrugated Container Antitrust Litigation, In re, 662 F.2d 875	6
Counselman v. *Hitchcock*, 142 U.S. 547	15
Gardner v. *Broderick*, 392 U.S. 273	15
Grand Jury Proceedings (Martinez), In re, 626 F. 2d 1051	9
Hoffman v. *United States*, 341 U.S. 479	15
Fisher v. *United States*, 425 U.S. 391	2, 3, 4, 5, 10, 11
Kastigar v. *United States*, 406 U.S. 441	3, 10, 14-15, 16
Katz v. *United States*, 389 U.S. 347	3
Lawn v. *United States*, 355 U.S. 339	15
Lefkowitz v. *Turley*, 414 U.S. 70	6, 15
Maness v. *Meyers*, 419 U.S. 449	14, 15
Michigan v. *Tucker*, 417 U.S. 433	14, 15
Murphy v. *Waterfront Comm'n*, 378 U.S. 52	15, 16
New Jersey v. *Portash*, 440 U.S. 450	14
Pillsbury Co. v. *Conboy*, No. 81-825 (Jan. 11, 1983)	7
Santobello v. *New York*, 404 U.S. 257	6
Shotwell Mfg. Co. v. *United States*, 371 U.S. 341	6
Simmons v. *United States*, 390 U.S. 377	6
Smith v. *United States*, 337 U.S. 137	15
United States v. *Apfelbaum*, 445 U.S. 115	14
United States v. *Calandra*, 414 U.S. 338	15
United States v. *Carter*, 454 F.2d 426	6
United States v. *D'Apice*, 664 F.2d 75	6
United States v. *De Sena*, 490 F.2d 692	6
United States v. *Doe*, 628 F.2d 694	9
United States v. *Librach*, 536 F.2d 1228, cert. denied, 429 U.S. 939	6
United States v. *Porter*, 711 F.2d 1397	9
United States v. *Rodman*, 519 F.2d 1058	6
United States v. *Sanderson*, 498 F.Supp. 273	6
United States v. *Winter*, 663 F.2d 1120, cert. denied, Nos. 81-1249, 81-1392 & 81-1394 (Feb. 28, 1983)	6
Whiskey Cases, 99 U.S. 594	6

Constitution, statutes and rule: Page

U.S. Const.:
Amend. IV 6
Amend. V ..... *passim*
18 U.S.C. 6001-6005 ..... 6, 7
18 U.S.C. 6003(b) 7
18 U.S.C. 6004(a) 7
Fed. R. Crim. P. 6(g) 13

Miscellaneous:

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671 (1968) 4
Measures Relating to Organized Crime: Hearings on S. 30, S. 974, et al. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) 7

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-786

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This case presents two principal questions: first, whether the Fifth Amendment privilege against compelled self-incrimination protects the *contents* of business records voluntarily prepared prior to the issuance of a subpoena seeking their production; and second, whether such a subpoena may be resisted on the ground that the *act of producing* those records would amount to testimonial self-incrimination even though the government has warranted not to make any use of the act of production.

A.

With respect to the first question—whether the contents of preexisting business records are privileged—we are merely asking the Court to follow its

reasoning in *Fisher* v. *United States*, 425 U.S. 391 (1976). As we explained in our opening brief (at 13-15), *Fisher* was based upon the principle that the Fifth Amendment privilege does not protect the contents of documents that were voluntarily prepared. The Court in *Fisher* wrote (425 U.S. at 409-410) (footnote omitted):

> [A]s far as the record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayer or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Respondent seeks (Br. 15) to distinguish *Fisher* from the present case on only one ground: ownership of the papers in question. But as shown in our opening brief (at 21-22), this distinction is irrelevant for Fifth Amendment purposes. If ownership were the determinative factor, the result in *Fisher* would presumably have been different if the taxpayers had purchased the papers from their accountants for nominal consideration. We cannot believe that the application of the Fifth Amendment privilege turns on such fine distinctions of property law.

Furthermore, ownership of subpoenaed records bears little relationship to the asserted purpose of the Fifth Amendment privilege upon which respondent's argument (Br. 15-16) rests: protection of personal privacy. Just because an individual owns documents —whether the collected works of Shakespeare or a

business ledger—does not mean that they fall within a protected "zone of privacy."

In any event, "[t]he proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony" was expressly rejected in *Fisher* (425 U.S. 400) and is inconsistent with modern Fifth Amendment law. For example, if immunity is granted, the Fifth Amendment does not prevent a witness from being compelled to divulge the most private information. *Kastigar* v. *United States*, 406 U.S. 441 (1972). Similarly, the Fifth Amendment privilege does not proscribe a search or electronic surveillance that reveals private matters. *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976); *Katz* v. *United States*, 389 U.S. 347, 354 (1967).

Respondent attempts (Br. 16) to distinguish *Andresen* based upon "the compulsion present when one is served with a subpoena as opposed to [the] lack thereof when a search warrant is involved." This difference, however, has nothing to do with whether the *contents* of documents are privileged. When a document subpoena is issued, the witness is called upon to produce the documents, and he may thus argue that the act of production amounts to testimonial self-incrimination. In the case of a search, there is no compelled act of production, and consequently no such argument can be made. But in both cases, the *contents* of the documents are the same, and there is no reason why the contents should be privileged in one situation but not in the other.

Finally, respondent's claim (Br. 8-17) that a subpoena for standard business records implicates important privacy interests rings hollow. As Judge Friendly has aptly put it, the types of documents in-

volved in this case—such as business ledgers, vouchers, and invoices (see Pet. App. 33a, 35a)—"are not the outpouring of an individual's soul." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 703 (1968).

In light of respondent's emphasis upon privacy, we reiterate that the subpoenas in this case called for the production of only common types of business records and not papers of a more personal nature. As in *Fisher* (425 U.S. at 401 n.7), "[s]pecial problems of privacy which might be presented by subpoena of a personal diary" or similar papers are not at issue here.

B.

1. The second chief question in this case concerns the act of producing the subpoenaed documents. While *Fisher* made clear that the contents of preexisting business records are not privileged under the Fifth Amendment, it left open the possibility that the act of producing such documents might be considered testimonial, either because it concedes their possession or control by the witness or because it tacitly authenticates them (see 425 U.S. at 410). In the wake of *Fisher*, witnesses have seized upon this idea as a way of circumventing *Fisher's* conclusion with respect to the contents of preexisting business documents, and courts openly hostile to *Fisher's* logic—like the court of appeals in the present case[1]—have

[1] Although *Fisher* stated (425 U.S. at 409) that *Boyd's* "prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him," the court of appeals in this case asserted (Pet. App. 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

adopted their arguments. While we accept and are prepared to deal with the possibility that the act of producing documents might amount to testimonial self-incrimination, it is abundantly clear that this possibility is ordinarily more theoretical than real and is seldom the real reason why a witness resists a subpoena duces tecum. If witnesses like respondent were really concerned about the act of producing documents, rather than the documents' unprivileged contents, they would have little incentive to resist the government's efforts to immunize the act of production. Instead, however, witnesses like respondent have made every effort to avoid the government's attempts to confer act-of-production immunity. In cases like this, what the prosecution wants, and what the witness fervently wants to prevent, is revelation of the documents' unprivileged contents.

2. The act of production in *Fisher* was held not to amount to testimonial self-incrimination (425 U.S. at 410-413). As explained in our opening brief (at 31-43), we think the same is true here with respect to most, if not all, of the subpoenaed documents. However, since making prosecutive use of the act of producing the documents is of no real interest to the government, we have been quite prepared to agree in exchange for receiving the documents that the act of production should be immunized.

In his brief, respondent does not dispute the principle that preventing prosecutive use of the act of production precludes any Fifth Amendment objection based upon that act. Nor does he quarrel with our contention (Br. 43-46) that barring use of the act of production in any subsequent criminal proceedings, as

opposed to a formal grant of immunity, is sufficient.[2] Instead, his only objection (Br. 21) is that the government's immunity offer in district court was not

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[2] We see no obstacle to recognition of this type of immunity. The court of appeals' suggestion (Pet. App. 19a) that immunity may not be granted without statutory authorization is contrary to the established rule that if a witness is compelled to testify despite a valid Fifth Amendment objection "his answers are inadmissible against him in a later criminal prosecution." *Lefkowitz* v. *Turley*, 414 U.S. at 78; see also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 347, 347 (1963); *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954) ("a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute").

Moreover, it is common practice for federal prosecutors to agree, often as part of a plea bargain calling for the defendant to testify, that such testimony will not be used against the defendant in any way. Such promises generally have been held to be enforceable. *E.g.*, *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975); *United States* v. *De Sena*, 490 F.2d 692, 694 (2d Cir. 1973); *United States* v. *Carter*, 454 F.2d 426, 427-428 (4th Cir. 1972); *United States* v. *Sanderson*, 498 F. Supp. 273, 276 (M.D. Fla. 1980). See *Santobello* v. *New York*, 404 U.S. 257, 263 (1971) (plea bargain enforceable). But see *United States* v. *D'Apice*, 664 F.2d 75, 77-78 (5th Cir. 1981). Cf. *Whiskey Cases*, 99 U.S. 594 (1878) (prosecutor's promise not bar to civil action but provides "equitable right" to executive clemency). Such informal immunity agreements have also been held to be consistent with 18 U.S.C. 6001-6005 and within the prosecutor's authority. *E.g.*, *United States* v. *Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), cert. denied, Nos. 81-1249, 81-1392 & 81-1394 (Feb. 28, 1983); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976). But see, *e.g.*, *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 887-888 (D.C. Cir. 1981).

Finally, in *Simmons* v. *United States*, 390 U.S. 377, 393-394 (1968), the Court protected the Fourth and Fifth Amendment rights of a defendant wishing to testify at a suppression hearing by prohibiting the introduction of his testimony at trial over his objection. There is, accordingly, ample precedent for

"coextensive with respondent's Fifth Amendment right." This objection is both factually mistaken and beside the point.

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non-statutory immunity designed to protect Fifth Amendment rights.

We recognize that in *Pillsbury Co.* v. *Conboy*, No. 81-825 (Jan. 11, 1983), slip op. 14, and *Maness* v. *Meyers*, 419 U.S. 449, 461-463 (1975), the Court did not accept the argument that a witness who claimed the Fifth Amendment privilege in a civil proceeding should be compelled to testify because any wrongfully compelled testimony would be inadmissible in a subsequent criminal case. But the situation in those cases was different in a critical respect; as noted in *Pillsbury Co.* (slip op. 14), compelling testimony and thereby conferring constructive use immunity without the government's consent "would be inconsistent with the congressional policy of leaving the granting of immunity to the Executive Branch." By following such a procedure, a court might unwittingly create taint problems that could jeopardize future prosecutions. In the present case, by contrast, the government has requested the immunity grant.

Constructive act of production immunity would free the government from compliance with the procedures mandated by 18 U.S.C. 6001-6005. See, *e.g.*, 18 U.S.C. 6003(b) (requiring approval of Attorney General, Deputy Attorney, or designated Assistant Attorney General when immunity given in court or grand jury proceedings); 18 U.S.C. 6004(a) (requiring Attorney General's approval in administrative proceedings). But the purpose of those procedures is not to protect the witness, whose Fifth Amendment rights are fully protected by a grant of use immunity irrespective of the internal government procedures followed before such immunity is conferred. Instead, the purpose of the statutory procedures is to prevent immunity grants that might jeopardize pending or future prosecutions by making it difficult for the government to demonstrate that its evidence derived from other sources. See, *e.g.*, *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, et al. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 386 (1969) (statement of Justice Depart-

It is mistaken because the government made clear in district court that it would agree, should respondent be prosecuted, not to use his act of production against him in any way. For example, one of its briefs stated: "[T]he government has already agreed on the record not to use the act of production against [the witness] in any manner, the functional equivalent of use immunity." [3] Memorandum in Support of Motion for Reconsideration at 21-22.[4]

Respondent's objection is beside the point for two reasons. First, it fails to address our argument that his Fifth Amendment rights will be fully protected

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ment). This concern is far less important where only act-of-production immunity is extended because, as previously noted, the significance of the testimony inherent in the act-of-production is generally slight. In addition, because use immunity for testimony is granted sparingly, the statutory procedures are not unduly burdensome in that context, whereas Fifth Amendment objections to subpoenaes duces tecum are common.

[3] We are lodging a copy of this memorandum with the Court.

[4] Neither of the courts below rejected the government's immunity offer on the ground that it was less extensive than respondent's Fifth Amendment privilege. The district court initially rejected our offer not to use respondent's act of production against him in any way because the court was unconvinced that "the existence, possession and authenticity of the documents can be proved without Mr. [Doe's] testimonial communication" (Pet. App. 26a). (In our view, possible gaps in the government's proof if act-of-production immunity is granted provide no basis for a witness to resist such immunity). Our motion for reconsideration, which presented our immunity argument more fully, was denied without opinion (J.A. 17; C.A. App. 135a).

The court of appeals rejected the government's immunity argument (Pet. App. 19a-20a) because statutory immunity was not offered and because "no procedure was ever agreed upon." We addressed the court of appeals' reasoning in our opening brief (at 47-48).

by prohibiting the introduction in subsequent proceedings of any evidence derived from the act of production. If that argument is correct—and respondent has not even attempted to show why it is not, apart from his contentions regarding the protected status of document contents—then there was obviously no justification for quashing the subpoenas.

Second, even if this Court agreed with the court of appeals that the government did not take the procedural steps necessary to offer act of production immunity in the district court, the case should nevertheless be remanded to the district court to afford the government the opportunity to provide such immunity by whatever procedure is determined constitutionally sufficient, as other courts have done. See *United States* v. *Porter*, 711 F.2d 1397, 1405 (7th Cir. 1983); *United States* v. *Doe*, 628 F.2d 694, 697 (1st Cir. 1980); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1058 (1st Cir. 1980). Certainly, the sound administration of justice would not be served by a decision affirming the judgment below on the basis of such a procedural technicality without addressing the underlying issue whether a defendant may resist a subpoena duces tecum on act-of-production grounds despite a procedurally correct grant of act of production immunity. If such a decision were handed down, the grand jury would almost certainly reissue the same subpoenas, the procedurally correct form of immunity would be extended, and the underlying issue would then be squarely presented. Before the issue could again reach this Court, however, this case would likely be moot. It is the rare grand jury case that can survive one, let alone two, trips to this Court without becoming moot.[5]

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[5] Of course, so long as the issue of the sufficiency of act-of-production immunity to secure compliance with the subpoena

3. Respondent contends (Br. 24-25) that the way in which act-of-production use immunity would work is "nebulous." In fact, however, the operation of this immunity is quite simple and does not differ in principle from grants of use immunity for other types of evidence. Act-of-production use immunity[6] would mean that in any subsequent criminal prosecution the government could not introduce against the witness either proof of the act of production itself or any evidence directly or indirectly derived therefrom. See *Kastigar*, 406 U.S. at 441-442. This means that the government would be in the same position as if it had obtained the documents by means other than the defendant's act of production, *i.e.*, as if the documents or tangible objects obtained had been found on the street or had arrived in the mail from an anonymous sender.

As noted (425 U.S. at 410), this Court recognized in *Fisher* that the act of producing documents might be considered testimonial in two ways: by tacitly authenticating them or by conceding their existence and possession by the person upon whom the subpoena is served. With regard to the possibility of tacit au-

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is resolved, it makes relatively little practical difference whether the judgment of the court of appeals is vacated or affirmed, since in the latter event a new subpoena could be issued and enforced on a constitutionally adequate grant of immunity.

[6] If statutory immunity is not required, as we suggest (see Br. 43-46), the immunity would take effect when the witness resisted compliance on the ground that the act of production was protected by the Fifth Amendment privilege and the court, at the government's request, compelled production without rejecting the witness's claim. If statutory immunity is required, then of course immunity would attach as prescribed by statute.

thentication, constructive use immunity would simply mean that proof of the act of production could not be used for authentication purposes in any subsequent proceedings. The documents would have to be authenticated by other means or else they could not be introduced.

Act-of-production use immunity would also mean that the prosecution could not introduce evidence of the act of production or evidence derived therefrom to show that the witness possessed or had control of the items subpoenaed (or, indeed, for any other purpose).[7] For example, if the grand jury subpoenaed

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[7] *Fisher* stated (425 U.S. at 410) (emphasis added) that compliance with a document subpoena "tacitly concedes *the existence of the papers* demanded and their possession or control by the [witness]." Referring to this language, Justice Marshall stated in concurrence (*id.* at 433-434) that act-of-production immunity would have to "extend to the testimony that the document is presently in existence." He continued (*id.* at 434) (footnote omitted) that "[s]uch a grant will effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony—that the document exists—and cannot usually be obtained without reliance on that testimony." See also Pet. App. 20a n.20. We disagree with this analysis. We will assume that by producing documents a witness in some sense testifies to their existence. We will also assume that such testimony would be covered by a grant of act-of-production immunity. The fact that the government may not make use of that testimony, however, is of absolutely no practical consequence because the act of production is not needed to prove the existence of the documents. If that were true, it would be impossible to prove the existence of documents found on the street or received in the mail from an anonymous sender. In those circumstances, as well as in the case of documents produced pursuant to subpoena, the documents themselves—which are not privileged—prove their own existence.

all of a witness's firearms, the prosecution could not introduce proof of the act of production to show possession by the witness. However, just as in the case of a weapon found on the street, the prosecution would not be barred from proving ownership or possession by inspecting the weapon's serial number or dusting it for fingerprints. Likewise, if, as in this case, the grand jury subpoenaed all of the bank statements of a named sole proprietorship, any ensuing prosecution could not use evidence of the act of production or evidence derived therefrom to prove that the bank accounts belonged to the sole proprietorship. But the documents' unprivileged contents could be used for that purpose.

4. Respondent contends (Br. 24) that the act of production would necessarily incriminate him in the eyes of the grand jury despite a grant of act of production immunity. In our opening brief, we argued (at 45 & n.35) that any significant danger of such self-incrimination could be eliminated by allowing the witness to turn over the documents to a third party —such as the court or prosecutor—who would then furnish them to the grand jury without revealing their origin. We also suggested that a protective order could be entered preventing the government from referring in any way to the act of production in proceedings before the grand jury.[8]

Respondent maintains (Br. 24) that even these safeguards are insufficient because the grand jury, aware of the prior issuance of the subpoena, would infer that the documents had been produced by the witness upon whom the subpoena was served. Whatever validity this argument might have in other cases,

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[8] The grand jury could also be instructed not to speculate or draw any inferences concerning the origin of the records.

it is surely not applicable here, where the subpoenas in question were issued three years ago. The grand jurors who sat at that time have long since been replaced. See Fed. R. Crim. P. 6(g). Moreover, even where the same grand jurors are sitting when the documents are produced, it is highly speculative that they would draw the inference to which respondent refers. The standard business records of a sole proprietorship may be obtained in many ways besides production by the sole proprietor himself. The same documents are frequently sought by subpoenas served on more than one party. They are often secured, either with or without subpoena, from third parties; indeed, respondent himself notes (Br. 8) that "here, many of the documents sought are readily available from other sources such as banks or other financial institutions." Copies of such documents are sometimes produced by employees of the sole proprietorship and are also secured on occasion by means of a search. In sum, respondent's objection about self-incrimination in the eyes of the grand jury is highly exaggerated, because it is speculative that the grand jurors will draw the inference to which respondent objects, because, as noted in our opening brief (at 31-43), the act of producing standard business records has little self-incriminatory potential, and because of the safeguards we have recommended.

In any event, this argument by respondent rests on an unsubstantiated—and, we believe, erroneous—assumption that use by the grand jury for purposes of returning an indictment would be within the proscription of the Fifth Amendment. This Court has never held that the Fifth Amendment privilege protects a witness from being compelled to give testimony that may influence the grand jury to return an indictment,

where that testimony may not be used against him in any way in a subsequent criminal prosecution. The Fifth Amendment provides that "[n]o person shall * * * be compelled *in any criminal case* to be a witness against himself" (emphasis added). This Court's cases makes clear that a grand jury witness—like a witness in a civil trial, administrative proceeding, or legislative hearing—may assert the Fifth Amendment privilege because the witness's self-incriminating testimony could be used against him in a criminal case. Referring to cases allowing a witness in such proceedings to claim the privilege, the Court in *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974), stated:

> The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury.

See also, *e.g.*, *United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980) (immunity grant does not prevent the use of compelled statements "for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution"); *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) ("a defendant's compelled statements * * * may not be put to any testimonial use whatever against him in a criminal trial"); *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975) (privilege "assure[s] that an individual is not compelled to produce evidence which may later be used against him as an accused in a criminal action"); *Kastigar* v. *United*

States, 406 U.S. 441, 445 (1972); *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *Smith* v. *United States*, 337 U.S. 137, 147 (1949) ("If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself"); *Brown* v. *Walker*, 161 U.S. 591, 597 (1896).[9] Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of defendant's Fifth Amendment privilege"); *Lawn* v. *United States*, 355 U.S. 339 (1958).

5. Act-of-production use immunity will fully safeguard the Fifth Amendment rights of witnesses served with document subpoenas. It will not shield the contents of preexisting documents. It will, however, fully

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[9] In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), where this Court first held that a grand jury witness could properly invoke the Fifth Amendment privilege, the Court stated (*id.* at 562) that "[t]he case before the grand jury was * * * a criminal case" within the meaning of the Fifth Amendment. But the Court reached that conclusion only because the witness would have been "liable to prosecution" if he had testified (*ibid.*). In any event, as noted in text, this Court's subsequent cases have made clear that a grand jury witness may invoke the Fifth Amendment privilege not because a grand jury proceeding is itself a criminal case, but because the testimony given might be used in such a case. See, *e.g.*, *Maness* v. *Meyers*, 419 U.S. at 461 (citing *Counselman*); *Michigan* v. *Tucker*, 417 U.S. at 440-441 (citing *Counselman*); *Lefkowitz* v. *Turley*, 414 U.S. at 77-78 (citing *Counselman*).

protect any testimony inherent in the act of production.

Most important, act of production immunity, whether statutory or constructive, will permit access by grand juries to the unprivileged contents of preexisting business records—access that is today blocked based upon the largely theoretical possibility that the act of producing those documents may amount to testimonial self-incrimination. This procedure will thus serve the public's "right to every man's evidence" in the absence of a valid claim of privilege. *Kastigar*, 406 U.S. at 443; see also *Murphy* v. *Waterfront Comm'n*, 378 U.S. at 93-94.

For the foregoing reasons and those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

NOVEMBER 1983

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No. 82-786-CFY
Status: GRANTED

Title: United States, Petitioner
v.
John Doe

Docketed:
November 8, 1982

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Philips, Richard T.

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1982		Application for extension of time to file petition and order granting same until November 8, 1982 (Brennan, October 1, 1982).
2	Nov 8 1982	G	Petition for writ of certiorari filed.
3	Dec 15 1982		DISTRIBUTED. January 7, 1983
4	Dec 20 1982	F	Response requested.
5	Dec 27 1982		Brief of respondent John Doe in opposition filed.
6	Jan 5 1983		DISTRIBUTED. January 21, 1983
7	Jan 18 1983	X	Reply brief of petitioner filed.
8	Apr 25 1983		REDISTRIBUTED. April 29, 1983
9	May 2 1983		Petition GRANTED.
			**********
11	Jun 16 1983		Order extending time to file brief of petitioner on the merits until July 16, 1983.
12	Jul 14 1983		Order further extending time to file brief of petitioner on the merits until August 3, 1983.
13	Aug 3 1983		Joint appendix filed.
14	Aug 5 1983		Brief of petitioner filed.
15	Aug 15 1983		Record filed.
16	Aug 15 1983		Certified C.A. partial proceedings received.
18	Aug 29 1983		Order extending time to file brief of respondent on the merits until October 8, 1983.
19	Oct 4 1983		Order further extending time to file brief of respondent on the merits until October 28, 1983.
20	Oct 24 1983		SET FOR ARGUMENT. Wednesday, December 7, 1983. (1st case) (1 hour)
21	Oct 31 1983		Brief of respondent John Doe filed.
22	Nov 2 1983		CIRCULATED.
23	Nov 4 1983		Record filed.
24	Nov 4 1983		Certified original record on appeal received.
25	Nov 25 1983	X	Reply brief of petitioner United States filed.
26	Dec 7 1983		ARGUED.